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Volume II

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NOTE

Symbols of United Nations documents are composed of capital letters combined with figures. Mention of such a symbol indicates a reference to a United Nations document.

The present document contains annexes IX and X of the report of the Human Rights Committee. Chapters I to VIII and annexes I to VIII, XI and XII are contained in volume I.

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Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights

A. Communication No. 321/1988, Maurice Thomas v. Jamaica (views adopted on 19 October 1993, forty-ninth session)

Submitted by: Maurice Thomas

Alleged victim: The author

State party: Jamaica

Date of communication: 10 July 1988

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 19 October 1993,

Having concluded its consideration of communication No. 321/1988, submitted to the Human Rights Committee by Mr. Maurice Thomas under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts its views under article 5, paragraph 4, of the Optional Protocol.

The facts as submitted by the author

1. The author of the communication is Maurice Thomas, a Jamaican citizen currently awaiting execution at St. Catherine District Prison. He claims to be the victim of a violation of articles 7 and 10 of the International Covenant on Civil and Political Rights by Jamaica. a/

2. The author states that on the evening of 9 July 1988, a contingent of soldiers conducted a search in a block of St. Catherine Prison. At the end of their search, some of the soldiers were directed to the death row section where the author and 16 other inmates were detained. The soldiers were accompanied by several prison warders, whom the author mentions by name. Both the soldiers and the warders are said to have maltreated the inmates, including the author. In particular, the author claims that he was severely beaten with rifle butts and that he sustained injuries in his chest, his back, his left hip and his lower abdomen. Moreover, one of the soldiers wounded him in the neck with a bayonet and tore his clothes. The author adds that following the beatings he was thrown back into his cell and left without any kind of medical attention.

The complaint and exhaustion of domestic remedies

3.1 The author claims that he is the victim of a violation of articles 7 and 10 of the Covenant.

3.2 With regard to the requirement of exhaustion of domestic remedies, the author states that he wrote to the Jamaican Minister of Justice and the Parliamentary Ombudsman. On 6 September 1988, he received a letter from the office of the former, informing him that his complaint was being investigated and that he would be contacted again at a later stage. Since then he has had no further information about the result of the investigation. The Parliamentary Ombudsman also replied to the author, that his complaint would receive "the most prompt attention possible". Notwithstanding further enquiries from the author, the Parliamentary Ombudsman has not contacted him again. The author submits that no Government official has ever visited him in prison in order to investigate the alleged incident.

3.3 The author further contends that, since he lacks the financial means to retain counsel for purposes of filing a constitutional motion to the Supreme (Constitutional) Court of Jamaica, a motion under Sections 17 and 25 of the Jamaican Constitution is not an effective remedy available to him within the meaning of article 5, paragraph 2 (b), of the Optional Protocol.

The State party's observations

4. The State party contends that the communication is inadmissible for non-exhaustion of domestic remedies, since the author has failed to pursue constitutional remedies available to him. The State party submits that section 17 of the Jamaican Constitution guarantees protection from cruel, inhuman and degrading treatment, and that pursuant to section 25, anyone who alleges that a right protected by the Constitution has been, is being or is likely to be contravened in relation to him may apply to the Supreme (Constitutional) Court for redress.

The Committee's decision on admissibility

5.1 At its forty-second session, the Committee considered the admissibility of the communication. It noted that the author had submitted his case to the Inter-American Commission on Human Rights, but that the examination thereof was discontinued on 27 March 1990. The Committee found, therefore, that it was not precluded from considering the author's communication under article 5, paragraph 2 (a), of the Optional Protocol.

5.2 The Committee noted the State party's contention that the communication was inadmissible because of the author's failure to pursue the constitutional remedies available to him. It also noted the author's contention that the remedy indicated by the State party was not a remedy available to him because of his lack of financial means and the unavailability of legal aid for purposes of filing a constitutional motion to the Supreme (Constitutional) Court of Jamaica. The Committee further considered that the author had demonstrated that he had made reasonable efforts through administrative demarches to seek redress in respect of ill-treatment allegedly suffered while in detention. The Committee therefore found that the requirements of article 5, paragraph 2 (b), of the Optional Protocol had been met.

5.3 On 4 July 1991, the Committee therefore declared the communication admissible in so far as it might raise issues under articles 7 and 10 of the Covenant.

Review of admissibility

6. In its submission dated 16 February 1993, the State party maintains that the communication is inadmissible for non-exhaustion of domestic remedies. It submits that there exists no absolute obligation under the Covenant for a State party to provide legal aid. In this connection, the State party argues that the author's indigence cannot be attributed to the State party and cannot serve as a justification for not exhausting domestic remedies.

7. The Committee has taken note of the arguments submitted to it by the State party and reiterates that domestic remedies within the meaning of the Optional Protocol must be both available and effective. The Committee considers, that, in the absence of legal aid, a constitutional motion does not, in the circumstances of the instant case, constitute an available remedy within the meaning of article 5, paragraph 2 (b), of the Optional Protocol. There is therefore no reason to revise the Committee's earlier decision on admissibility of 4 July 1991.

Examination of the merits

8. The State party informs the Committee, by submission of 16 February 1993, that it has ordered investigations into the author's allegations and that it will forward the results to the Committee as soon as they are available. The Committee notes that the State party was informed about the author's allegations on 17 November 1988 and that it has not concluded its investigations some 60 months after the event complained of.

9.1 The Committee has considered the communication in the light of all information made available to it by the parties, as required under article 5, paragraph 1, of the Optional Protocol. The Committee notes that the State party has confined itself to issues of admissibility. Article 4, paragraph 2, of the Optional Protocol enjoins the State party to investigate in good faith all the allegations made against it, and to make available to the Committee all information at its disposal. In the circumstances due weight must be given to the author's allegations, to the extent that they have been substantiated.

9.2 It remains uncontested that, on 9 July 1988, the author was assaulted by soldiers and warders, who beat him with rifle butts, as a result of which he sustained injuries in his chest, his back, his left hip and his lower abdomen, for which he did not receive medical treatment. The Committee considers that these claims have been substantiated and that the facts before the Committee amount to degrading treatment within the meaning of article 7 of the International Covenant on Civil and Political Rights and also entail a violation of article 10, paragraph 1, of the Covenant.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of articles 7 and 10, paragraph 1, of the International Covenant on Civil and Political Rights.

11. The Committee is of the view that Mr. Maurice Thomas, a victim of a violation of articles 7 and 10 of the International Covenant on Civil and Political Rights, is entitled, under article 2, paragraph 3 (a), of the Covenant, to an effective remedy, including appropriate compensation. The State party is under an obligation to investigate the allegations made by the author with a view to instituting, as appropriate, criminal or other procedures against

those found responsible and to take such other measures as may be necessary to prevent similar violations from occurring in the future.

12. The Committee would wish to receive information, within 90 days, on any relevant measures taken by the State party in respect of the Committee's views.

[Done in English, French and Spanish, the English text being the original version.]

Notes

a/ The author's claims under articles 7 and 10 refer to the same factual background as in communication No. 320/1988 (Victor Francis v. Jamaica), views adopted on 24 March 1993 (see Official Records of the General Assembly, Forty-eighth Session, Supplement No. 40 (A/48/40), annex XII.K).

B. Communication No. 322/1988, Hugo Rodríguez v. Uruguay
(views adopted on 19 July 1994, fifty-first session)

Submitted by: Hugo Rodríguez

Victim: The author

State party: Uruguay

Date of communication: 23 July 1988 (initial submission)

Date of decision on admissibility: 20 March 1992

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 19 July 1994,

Having concluded its consideration of communication No. 322/1988 submitted to the Human Rights Committee by Mr. Hugo Rodríguez under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts its views under article 5, paragraph 4, of the Optional Protocol.

1. The author of the communication is Hugo Rodríguez, a Uruguayan citizen residing in Montevideo. Although he invokes violations by Uruguay of articles 7, 9, 10, 14, 15, 18 and 19 of the International Covenant on Civil and Political Rights, he requests the Human Rights Committee to focus on his allegations concerning article 7 of the Covenant and on the State party's alleged failure properly to investigate his case, to punish the guilty and to award him appropriate compensation. The author is the husband of Lucía Arzuaga Gilboa, whose communication No. 147/1983 was also considered by the Committee. [a]

The facts as submitted by the author

2.1 In June 1983, the Uruguayan police arrested the author and his wife, together with several other individuals. The author was taken by plainclothes policemen to the headquarters of the secret police (Dirección Nacional de Información e Inteligencia), where he allegedly was kept handcuffed for several hours, tied to a chair and with his head hooded. He was allegedly forced to stand naked, still handcuffed, and buckets of cold water were poured over him. The next day, he allegedly was forced to lie naked on a metal bedframe; his arms and legs were tied to the frame and electric charges were applied (*picana eléctrica*) to his eyelids, nose and genitals. Another method of ill-treatment consisted in coiling wire around fingers and genitals and applying electric current to the wire (*magneto*); at the same time, buckets of dirty water were poured over him. Subsequently, he allegedly was suspended by his arms, and electric shocks were applied to his fingers. This treatment continued for a week, after which the author was relocated to another cell; there he remained incomunicado for another week. On 24 June, he was brought before a military judge and indicted on unspecified charges. He remained detained at the "Libertad Prison" until 27 December 1984.

2.2 The author states that during his detention and even thereafter, until the transition from military to civilian rule, no judicial investigation of his case could be initiated. After the re-introduction of constitutional guarantees in March 1985, a formal complaint was filed with the competent authorities. On 27 September 1985, a class action was brought before the Court of First Instance (Juzgado Letrado de Primera Instancia en lo Penal de 4 Turno) denouncing the torture, including that suffered by the author, perpetrated on the premises of the secret police. The judicial investigation was not, however, initiated because of a dispute over the court's jurisdiction, as the military insisted that only military courts could legitimately carry out the investigations. At the end of 1986, the Supreme Court of Uruguay held that the civilian courts were competent, but in the meantime, the Parliament had enacted, on 22 December 1986, Law No. 15,848, the Limitations Act or Law of Expiry (Ley de Caducidad) which effectively provided for the immediate end of judicial investigation into such matters and made impossible the pursuit of this category of crimes committed during the years of military rule.

The complaint

3. The author denounces the acts of torture to which he was subjected as a violation of article 7 of the Covenant and contends that he and others have been denied appropriate redress in the form of investigation of the abuses allegedly committed by the military authorities, punishment of those held responsible and compensation to the victims. In this context, he notes that the State party has systematically instructed judges to apply Law No. 15,848 uniformly and close pending investigations; the President of the Republic himself allegedly advised that this procedure should be applied without exception. The author further contends that the State party cannot, by simple legislative act, violate its international commitments and thus deny justice to all the victims of human rights abuses committed under the previous military regime.

The State party's information and observations and the author's comments thereon

4.1 The State party argues that the communication be declared inadmissible on the ground of non-exhaustion of domestic remedies. It rejects the author's contention that his complaints and the judicial proceedings were frustrated by the enactment of Law No. 15,848. First, the enactment of the law did not necessarily result in the immediate suspension of the investigation of allegations of torture and other wrongdoings, and article 3 of the law provides for a procedure of consultation between the Executive and the Judiciary. Secondly, article 4 does not prohibit investigations into situations similar to those invoked by the author, since the provision "authorizes an investigation by the Executive Power to clarify cases in which the disappearance of persons in presumed military or police operations has been denounced". Thirdly, the author could have invoked the unconstitutionality of Law No. 15,848; if his application had been accepted, any judicial investigation into the facts alleged to have occurred would have been reopened.

4.2 The State party further explains that there are other remedies, judicial and non-judicial, which were not exhausted in the case: first, "the only thing which Law No. 15,848 does not permit ... is criminal prosecution of the offenders; it does not leave the victims of the alleged offences without a remedy". Thus, victims of torture may file claims for compensation through appropriate judicial or administrative channels; compensation from the State of Uruguay may, for instance, be claimed in the competent administrative court. The State party notes that many such claims for compensation have been granted, and similar actions are pending before the courts.

4.3 Subsidiarily, it is submitted that Law No. 15,848 is consistent with the State party's international legal obligations. The State party explains that the law "did establish an amnesty of a special kind and subject to certain conditions for military and police personnel alleged to have been engaged in violations of human rights during the period of the previous ... regime .... The object of these legal normative measures was, and still is, to consolidate the institution of democracy and to ensure the social peace necessary for the establishment of a solid foundation of respect of human rights." It is further contended that the legality of acts of clemency decreed by a sovereign State, such as an amnesty or an exemption, may be derived from article 6, paragraph 4, of the Covenant and article 4 of the American Convention on Human Rights. In short, an amnesty or abstention from criminal prosecution should be considered not only as a valid form of legal action but also the most appropriate means of ensuring that situations endangering the respect for human rights do not occur in the future. The State party invokes a judgement of the Inter-American Court of Human Rights in support of its contention. b/

5.1 Commenting on the State party's submission, the author maintains that Law No. 15,848 does not authorize investigations of instances of torture by the Executive: its article 4 only applies to the alleged disappearance of individuals.

5.2 With respect to a constitutional challenge of the law, the author points out that other complainants have already challenged Law No. 15,848 and that the Supreme Court has ruled that it is constitutional.

Consideration of and decision on admissibility

6.1 At its forty-fourth session, the Committee considered the admissibility of the communication. The Committee ascertained, as it is required to do under article 5, paragraph 2 (a), of the Optional Protocol, that the matter was not being examined by the Inter-American Commission on Human Rights.

6.2 The Committee further took note of the State party's contention that the author had failed to exhaust available domestic remedies and that civil and administrative, as well as constitutional, remedies remained open to him. It observed that article 5, paragraph 2 (b), of the Optional Protocol required exhaustion of local remedies only to the extent that these are both available and effective; authors are not required to resort to extraordinary remedies or remedies the availability of which is not reasonably evident.

6.3 In the Committee's opinion, a constitutional challenge of Law No. 15,848 fell into the latter category, especially given that the Supreme Court of Uruguay has deemed the law to be constitutional. Similarly, to the extent that the State party indicated the availability of administrative remedies possibly leading to the author's compensation, the author plausibly submitted that the strict application of Law No. 15,848 frustrates any attempt to obtain compensation, as the enforcement of the law bars an official investigation of his allegations. Moreover, the author stated that on 27 September 1985 he and others started an action with the Juzgado Letrado de Primera Instancia en lo Penal, in order to have the alleged abuses investigated. The State party did not explain why no investigations were carried out. In the light of the gravity of the allegations, it was the State party's responsibility to carry out investigations, even if as a result of Law No. 15,848 no penal sanctions could be imposed on persons responsible for torture and ill-treatment of prisoners. The absence of such investigation and of a final report constituted a considerable impediment to the pursuit of civil remedies, e.g. for compensation.

In these circumstances, the Committee found that the State party itself had frustrated the exhaustion of domestic remedies and that the author's complaint to the Juzgado Letrado de Primera Instancia should be deemed a reasonable effort to comply with the requirements of article 5, paragraph 2 (b).

6.4 To the extent that the author claimed that the enforcement of Law No. 15,848 frustrated his right to see certain former government officials criminally prosecuted, the Committee recalled its prior jurisprudence that the Covenant does not provide a right for an individual to require that the State party criminally prosecute another person. c/ Accordingly, this part of the communication was found to be inadmissible ratione materiae as incompatible with the provisions of the Covenant.

7. On 20 March 1992, the Human Rights Committee decided that the communication was admissible in so far as it appeared to raise issues under article 7 of the Covenant.

The State party's observations

8.1 On 3 November 1992 the State party submitted its observations on the Committee's admissibility decision, focusing on the legality of Law No. 15,848 in the light of international law. It considered the Committee's decision to be unfounded, since the State's power to declare amnesty or to bar criminal proceedings are "matters pertaining exclusively to its domestic legal system, which by definition have constitutional precedence".

8.2 The State party emphasizes that Law No. 15,848 on the lapsing of State prosecutions was endorsed in 1989 by referendum, "an exemplary expression of direct democracy on the part of the Uruguayan people". Moreover, by a decision of 2 May 1988, the Supreme Court declared the law to be constitutional. It maintains that the law constituted a sovereign act of clemency that is fully in accord and harmony with the international instruments on human rights.

8.3 It is argued that notions of democracy and reconciliation ought to be taken into account when considering laws on amnesty and on the lapsing of prosecutions. In this context, the State party indicated that other relevant laws were adopted, including Law No. 15,737, adopted on 15 March 1985, which decreed an amnesty for all ordinary political and related military offences committed since 1 January 1962, and which recognized the right of all Uruguayans wishing to return to the country to do so and the right of all public officials dismissed by the military Government to be reinstated in their respective positions. This law expressly excluded from amnesty offences involving inhuman or degrading treatment or the disappearance of persons under the responsibility of police officers or members of the armed forces. By Law No. 15,783 of 28 November 1985, persons who had been arbitrarily dismissed for political, ideological or trade-union reasons were entitled to reinstatement.

8.4 With regard to the right to judicial safeguards and the obligation to investigate, the State party asserts that Law No. 15,848 in no way restricts the system of judicial remedies established in article 2, paragraph 3, of the Covenant. Pursuant to this law, only the State's right to bring criminal charges lapsed. The law did not eliminate the legal effects of offences in areas outside the sphere of criminal law. Moreover, the State argues, its position is consistent with the judgement of the Inter-American Court of Human Rights in the case of Velasquez Rodríguez that the international protection of human rights should not be confused with criminal justice (para. 174).

8.5 In this connection, the State party contends that "to investigate past events ... is tantamount to reviving the confrontation between persons and groups. This certainly will not contribute to reconciliation, pacification and the strengthening of democratic institutions." Moreover, "the duty to investigate does not appear in the Covenant or any express provision, and there are consequently no rules governing the way this function is to be exercised. Nor is there any indication in the Convention text concerning its precedence or superiority over other duties - such as the duty to punish - nor, of course, concerning any sort of independent legal life detached from the legal and political context within which human rights as a whole come into play ... The State can, subject to the law and in certain circumstances, refrain from making available to the person concerned the means of establishing the truth formally and officially in a criminal court, which is governed by public, not private interest. This, of course, does not prevent or limit the free exercise by such a person of his individual rights, such as the right to information, which in many cases in themselves lead to the discovery of the truth, even if it is not the public authorities themselves that concern themselves with the matter."

8.6 With regard to the author's contention that Law No. 15,848 "frustrates any attempt to obtain compensation, as the enforcement of the law bars an official investigation of his allegations" the State party asserts that there have been many cases in which claims similar to that of the author have succeeded in civil actions and that payment has been obtained.

9. The State party's submission was transmitted to the author for comments on 5 January 1993. In spite of a reminder dated 9 June 1993, no comments were received from the author.

The Committee's views on the merits

10. The Committee has taken due note of the State party's contention that the Committee's decision on admissibility was not well founded.

11. Even though the State party has not specifically invoked article 93, paragraph 4, of the Committee's rules of procedure, the Committee has ex officio reviewed its decision of 20 March 1992 in the light of the State party's arguments. The Committee reiterates its finding that the criteria of admissibility of the communication were satisfied and holds that there is no reason to set aside the decision.

12.1 With regard to the merits of the communication, the Committee notes that the State party has not disputed the author's allegations that he was subjected to torture by the authorities of the then military regime in Uruguay. Bearing in mind that the author's allegations are substantiated, the Committee finds that the facts as submitted sustain a finding that the military regime in Uruguay violated article 7 of the Covenant. In this context, the Committee notes that, although the Optional Protocol lays down a procedure for the examination of individual communications, the State party has not addressed the issues raised by the author as a victim of torture nor submitted any information concerning an investigation into the author's allegations of torture. Instead, the State party has limited itself to justifying, in general terms, the decision of the Government of Uruguay to adopt an amnesty law.

12.2 As to the appropriate remedy that the author may claim pursuant to article 2, paragraph 3, of the Covenant, the Committee finds that the adoption of Law No. 15,848 and subsequent practice in Uruguay have rendered the realization of the author's right to an adequate remedy extremely difficult.

12.3 The Committee cannot agree with the State party that it has no obligation to investigate violations of Covenant rights by a prior regime, especially when these include crimes as serious as torture. Article 2, paragraph 3 (a) of the Covenant clearly stipulates that each State party undertakes "to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity". In this context, the Committee refers to its general comment No. 20 (44) on article 7, d/ which provides that allegations of torture must be fully investigated by the State:

> "Article 7 should be read in conjunction with article 2, paragraph 3 .... The right to lodge complaints against maltreatment prohibited by article 7 must be recognized in the domestic law. Complaints must be investigated promptly and impartially by competent authorities so as to make the remedy effective ....
>
> "The Committee has noted that some States have granted amnesty in respect of acts of torture. Amnesties are generally incompatible with the duty of States to investigate such acts; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future. States may not deprive individuals of the right to an effective remedy, including compensation and such full rehabilitation as may be possible."

The State party has suggested that the author may still conduct private investigations into his torture. The Committee finds that the responsibility for investigations falls under the State party's obligation to grant an effective remedy. Having examined the specific circumstances of this case, the Committee finds that the author has not had an effective remedy.

12.4 The Committee moreover reaffirms its position that amnesties for gross violations of human rights and legislation such as Law No. 15,848, Ley de Caducidad de la Pretensión Punitiva del Estado, are incompatible with the obligations of the State party under the Covenant. The Committee notes with deep concern that the adoption of this law effectively excludes in a number of cases the possibility of investigation into past human rights abuses and thereby prevents the State party from discharging its responsibility to provide effective remedies to the victims of those abuses. Moreover, the Committee is concerned that, in adopting this law, the State party has contributed to an atmosphere of impunity which may undermine the democratic order and give rise to further grave human rights violations. e/

13. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol, is of the view that the facts before it disclose a violation of article 7, in connection with article 2, paragraph 3, of the Covenant.

14. The Committee is of the view that Mr. Hugo Rodríguez is entitled, under article 2, paragraph 3 (a), of the Covenant, to an effective remedy. It urges the State party to take effective measures (a) to carry out an official investigation into the author's allegations of torture, in order to identify the persons responsible for torture and ill-treatment and to enable the author to seek civil redress; (b) to grant appropriate compensation to Mr. Rodríguez; and (c) to ensure that similar violations do not occur in the future.

15. The Committee would wish to receive information, within 90 days, on any relevant measures adopted by the State party in respect of the Committee's views.

[Adopted in English, French and Spanish, the English text being the original version.]

Notes

a/ See Official Records of the General Assembly, Forty-first Session, Supplement No. 40 (A/41/40), annex VIII.B, views adopted during the twenty-sixth session, on 1 November 1985, in which the Committee held that the facts disclosed violations of articles 7 and 10, paragraph 1, of the Covenant.

b/ Judgement of the Inter-American Court of Human Rights in the case of Velasquez Rodríguez, given on 29 July 1988. Compare, however, the Advisory Opinion OC-13/93 of 16 July 1993, affirming the competence of the Inter-American Commission on Human Rights to find any norm of the internal law of a State party to be in violation of the latter's obligations under the American Convention on Human Rights. See also resolution No. 22/88 in case No. 9850 concerning Argentina, given on 4 October 1990, and report No. 29/92 of 2 October 1992 concerning the Uruguayan cases 10.029, 10.036, 10.145, 10.305, 10.372, 10.373, 10.374 and 10.375, in which the Commission concluded that "Law 15,848 of December 22, 1986 is incompatible with article XVIII (right to a fair trial) of the American Declaration of the Rights and Duties of Man, and articles 1, 8 and 25 of the American Convention on Human Rights". The Commission further recommended to the Government of Uruguay that it give the applicant victims or their rightful claimants just compensation, and that "it adopt the measures necessary to clarify the facts and identify those responsible for the human rights violations that occurred during the de facto period". (Annual Report of the Inter-American Commission on Human Rights, 1992-1993, p. 165).

c/ See Official Records of the General Assembly, Forty-fourth Session, Supplement No. 40 (A/44/40), annex XI.B, communication No. 213/1986 (H. C. M. A. v. the Netherlands), declared inadmissible on 30 March 1989, para. 11.6; and ibid., Forty-fifth Session, Supplement No. 40 (A/45/40), annex X.J, communication No. 275/1988 (S. E. v. Argentina), declared inadmissible on 26 March 1990, para. 5.5.

d/ Adopted at the Committee's forty-fourth session, in 1992; see Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40 (A/47/40), annex VI.A.

e/ See the comments of the Committee on Uruguay's third periodic report under article 40 of the Covenant, adopted on 8 April 1993, Official Records of the General Assembly, Forty-eighth Session, Supplement No. 40 (A/48/48), chap. III.

C. *Communication No. 328/1988, Roberto Zelaya Blanco v. Nicaragua* (*views adopted on 20 July 1994, fifty-first session*)

Submitted by: Myriam Zelaya Dunaway and Juan Zelaya, later joined by their brother, the alleged victim

Victim: Roberto Zelaya Blanco

State party: Nicaragua

Date of communication: 20 July 1988 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 20 July 1994,

Having concluded its consideration of communication No. 328/1988, submitted to the Human Rights Committee by Ms. Myriam Zelaya Dunaway and Juan Zelaya under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the authors of the communication and the State party,

Adopts its views under article 5, paragraph 4, of the Optional Protocol.

1. The authors of the initial communication are Myriam Zelaya Dunaway and Juan Zelaya, citizens of the United States of America of Nicaraguan origin, currently residing in the United States. They submit the communication on behalf and upon the request of their brother, Roberto Zelaya Blanco, a Nicaraguan citizen born in 1935, at the time of submission of the communication detained at the prison of Tipitapa, Nicaragua. The authors allege that their brother has been a victim of violations by Nicaragua of articles 7, 9, 10, 14 and 17 of the International Covenant on Civil and Political Rights. In March 1989, Roberto Zelaya was released from detention on the basis of a governmental pardon, and on 19 June 1992 he confirmed the contents of the communication and joined his sister and brother as co-author. He now resides in the United States together with his wife and son.

The facts as submitted by the authors

2.1 Roberto Zelaya Blanco, an engineer and university professor, was arrested without a warrant on 20 July 1979, the day after the assumption of power by the Sandinista Government. He was tried by a Peoples' Tribunal (Tribunal Especial Primero), on account of his outspoken criticism of the Marxist orientation of the Sandinistas. On 23 February 1980, he was sentenced to 30 years' imprisonment. The Tribunal Especial Primero de Apelación confirmed the sentence on 14 March 1980 without an appeal hearing.

2.2 With respect to the issue of exhaustion of domestic remedies, the authors state that because of the political situation in Nicaragua, they were for a long time unable to identify Nicaraguan lawyers willing to take up their brother's case. Only at the beginning of 1989 did Roberto Zelaya inform his family that a lawyer, J. E. P. B., had indicated his readiness to represent him.

2.3 It is submitted that several organizations, including the Inter-American Commission on Human Rights, Amnesty International, the International Commission of Jurists and the International Committee of the Red Cross (Nicaraguan Section), were apprised of Mr. Zelaya's fate and visited him in prison. The authors add that they addressed many written complaints about their brother's fate to various Nicaraguan authorities, including President Daniel Ortega and the prison management, but that they did not receive any reply.

2.4 Upon his release in March 1989, Mr. Zelaya was allegedly threatened by a prison guard, "Comandante Pedro", with the words "Be very careful. If you dare write or speak against the Sandinistas, you will regret it."

The complaint

3.1 The authors submit that there was no wrongdoing or criminal activity on the part of their brother, and that the accusations formulated against him by the Sandinistas (apología del delito; instigación para delinquir) were purely political. It is claimed that Roberto Zelaya was detained arbitrarily from July 1979 to March 1989, that he was denied a fair hearing before an independent and impartial tribunal, that he was tortured and was subjected to pseudo-medical and pharmacological experiments, to inhuman treatment and death threats while in prison, and that the correspondence between Roberto Zelaya and his family was systematically interfered with by the prison authorities.

3.2 The authors submit that their brother's health, already precarious, deteriorated as a result of his detention. They submit that asthma attacks were treated experimentally with cortisone and other drugs. Finally, other inmates and a prison warder A. V. C. are said to have made death threats against Mr. Zelaya on numerous occasions.

The State party's information and the authors' comments thereon

4.1 The State party indicates that Roberto Zelaya Blanco was released from detention pursuant to a presidential pardon of 17 March 1989 (Decreto de Indulto No. 044).

4.2 The authors submit that their brother is currently receiving specialized medical treatment for the ailments developed or aggravated during 10 years of detention, *inter alia*, asthma and chronic hepatitis. They add that the treatment requires frequent and prolonged hospitalization.

The Committee's decision on admissibility

5.1 The Committee ascertained, as it is required to do under article 5, paragraph 2 (a), of the Optional Protocol, that the case was not under examination by another instance of international investigation or settlement. The general investigation, by regional and intergovernmental human rights organizations, of situations affecting a number of individuals, including the author of a communication under the Optional Protocol, does not constitute the "same matter" within the meaning of article 5, paragraph 2 (a).

5.2 The Committee interpreted the State party's general submission that Mr. Zelaya Blanco had been released from detention as implying that he had been offered an appropriate remedy. However, the Committee reiterated its position that it is implicit in rule 91 of the rules of procedure and article 4, paragraph 2, of the Optional Protocol, that a State party to the Covenant should make available to the Committee all the information at its disposal; this includes, at the stage of the determination of the admissibility of a communication, the provision of sufficiently detailed information about remedies pursued by, as well as remedies still available, to victims of alleged violations of their rights. The State party did not forward such information. On the basis of the information before it, the Committee concluded that there are no further effective remedies available to Roberto Zelaya in the circumstances of his case.

5.3 The Committee observed that the authorities of any State party to the Covenant are under an obligation to investigate alleged human rights violations and to make available appropriate judicial remedies and compensation to victims of such violations, even if they are attributable to a previous administration.

5.4 The Committee considered that the authors' allegations had been sufficiently substantiated, for purposes of admissibility, and that they raised issues under articles 7, 9, 10, 14 and 17 of the Covenant.

5.5 On 20 March 1992, the Human Rights Committee decided that the communication was admissible inasmuch as it appeared to raise issues under articles 7, 9, 10, 14 and 17 of the Covenant.

The State party's observations and the authors' comments thereon

6.1 On 27 July 1992, the State party submitted that the new Government had embarked on a process of national reconciliation, without revanchism. At the same time, Nicaragua's independent judiciary now exercises an eminent role in protecting human rights. Since Mr. Zelaya enjoys all civil and political rights in Nicaragua, he is at liberty to demand compensation or any other remedy he may consider appropriate.

6.2 On 5 October 1992, Roberto Zelaya Blanco responded that he could not expect to receive any compensation from ad hoc tribunals in Nicaragua, heirs of the Tribunales Especiales de Justicia, which had convicted him and others without due process. In particular, he disputes the State party's submission that the Nicaraguan judiciary is now independent, because many judges, including those sitting in the Supreme Court, are political appointees of the former Sandinista Government. Moreover, he contends that if the new government were committed to impartial justice, it would have prosecuted *motu proprio* those responsible for crimes, corruption and other abuses during the years of the Sandinista administration. He further questions the commitment to human rights of the Government of Violeta Barrios de Chamorro, since she herself, as member of the then Sandinista Government (*miembro de la Junta de Gobierno de Reconstrucción Nacional*), had signed Decree No. 185 of 29 November 1979, which established the Tribunales Especiales de Justicia, which depended directly on the executive (*poder ejecutivo*) and prosecuted many former civil servants for the so-called crime of conspiracy (*delito de asociación para delinquir*) merely because they had been civil servants during the Somoza administration.

6.3 With regard to the confiscation of his property, the author invokes article 17 of the Universal Declaration of Human Rights, which protects the right to property, and points out that the confiscation decrees of the Sandinista Government had been signed by many of the current members of the Government, including the new President, Mrs. Violeta Barrios de Chamorro, in particular Decree No. 38 of 8 August 1979, which provided for the expropriation of former civil servants of the Somoza administration, including the medical doctors and dentists in the service of the Somoza family. The author lists three pieces of real property which he had owned and which were confiscated by the Sandinista Government and subsequently sold to third parties. The author alleges that the new Government is applying dilatory tactics to frustrate the restitution of such property, and rendering the process so complicated that claimants eventually abandon their claims because of the expense involved in attempting to recuperate their property. The author concludes that what was confiscated by way of administrative measures ought to be returned to the rightful owners also by administrative decree. The author further alleges discrimination in that the confiscated property of persons who were United States citizens before 19 July 1979 has been returned, whereas the property formerly owned by Nicaraguan citizens can only be recovered through onerous litigation.

6.4 With regard to his detention, the author claims that it was unlawful and arbitrary and that he was denied due process by the revolutionary tribunals. He encloses excerpts from the Amnesty International report entitled Nicaragua: Derechos Humanos 1986-1989, which specifically refers to its own investigation of the Zelaya case. The report concluded:

> "After examining the judgment and interviewing the prisoner in November 1987, Amnesty International arrived at the conclusion that there was no evidence that could prove the criminal charges against him: no victim had been identified in relation to the accusation of murder, and as to the other charges, the victim had been only referred to as 'the people of Nicaragua'. It would seem that the conviction was predicated on Mr. Zelaya Blanco's open anti-Sandinista position in the pre-revolutionary period and on his various journalistic publications ..." a/

6.5 The author further describes the torture and ill-treatment to which he was allegedly subjected. On 11 October 1979, he and other detainees were taken out of their cells by mercenaries of Argentinian nationality, Che Walter and Che Manuel. At 9 a.m. they were taken to an office where they were beaten. In particular, he claims that he was handcuffed and hanged with a chain from the roof of the office. He was allegedly asked to sign a confession concerning the assassination of Pedro Joaquin Chamorro, the husband of the current President of Nicaragua. The text of the confession was read out to him by D. M. R., the legal counsel to the Police Commander. He categorically refused to sign any such statement, in spite of threats. At 1 p.m., the interrogators returned with one of the most notorious torturers of the Dirección General de Seguridad del Estado, but he continued to refuse to sign any confession, whereupon Che Manuel, J. M. S. and R. C. G. proceeded to administer beatings all over his body until 7 p.m. At 11 p.m., the chains were removed, and he fell to the floor, where he was kicked by the same interrogators. He was then driven out of town, where he and 15 other prisoners were to be executed. Someone read out the death sentences ordered by the Junta de Gobierno de Reconstrucción Nacional. Whereas the other 15 were killed, he was not. Although he does not remember clearly what happened, it appears that he passed out and only regained consciousness sometime after the shooting, when he was lying on the ground and still handcuffed. At 2 a.m. on 12 October 1979, he was taken to Managua to the offices of the Dirección General de Seguridad del Estado, where he was received by "Compañero Ernesto", who removed his handcuffs. At 6.30 a.m., he was taken to a house that had been used as a dormitory of the former Oficina de Seguridad Nacional and interrogated there by "Comandante Pedro", whose real name was R. B., who also took his Bulova wristwatch, his wedding ring and his wallet containing 400 cordobas. He names five witnesses who saw him arrive at the offices of the Dicrección General de Seguridad del Estado. At around noon Comandante Pedro, together with J. R. (Compañero Patricio) and H. I. (Capitán

Santiago), came to pick him up, handcuffed and took him to a room where he was again chained, partially suspended from the ceiling. He was told that the academic and administrative cadres of the University of Nicaragua were full of agents of the CIA and that he should endorse a declaration prepared for his signature, denouncing, inter alia, some of his University colleagues, Professors E. A. C., F. C. G., J. C. V. R. and A. F. V. When he refused to sign the declaration, because he never had any contact or relationship with the CIA, he was beaten by Comandante Pedro, Compañero Patricio and Capitán Santiago. He was then left in peace for a few weeks, but on 7 November 1979 he was again handcuffed, blindfolded and taken by Comandante Pedro to a place where two truckloads of prisoners were being assembled. He was forced to board one of the trucks and was driven out of town, where the prisoners were made to climb down and walk to a spot where they were ordered to kneel; approximately 30 of them were shot with a bullet to the back of the head. The surviving 10 were taken elsewhere. He was told not to speak of what he had witnessed because his wife and son would be made to suffer for it.

6.6 On 26 November 1979, the author and 23 other prisoners were taken to a new prison establishment near the international airport of Managua, the Centro de Rehabilitación Social y Política, under Comandante V. J. G., who allegedly personally assassinated several guards of the former Somoza Government.

6.7 On 7 December, after two months of incomunicado detention, he was allowed to be visited by his wife. He learned from her that their home had been ransacked on 12 October by forces of the Dirección General de Seguridad del Estado, which beat up his then pregnant wife, causing a miscarriage, and stole jewels and other items of personal property.

6.8 On 26 March 1980 at 11 p.m., he was transferred, together with some 29 other political prisoners, to the Carcel Modelo, which was more like a concentration camp where the inmates had been so undernourished, he claims, that they looked like figures from Buchenwald. Because of the torture and the fear of being summarily executed, the prisoners appeared traumatized. Moreover, family visits were not allowed, nor was the sending of food packages. Responsible for the abuses were F. F. A., F. L. A., S. A. G. and J. I. G. C. Principal responsibility, however, lay on J. M. A., the Director of the Penitentiary system, under whose orders allegedly more than 100 political prisoners were shot.

6.9 The author claims that these crimes and abuses have not been investigated by the new Government of Nicaragua.

6.10 In a further submission of 29 March 1993, the author refers to a book by Dr. Carlos Humberto Canales Altamirano, Injusticia Sandinista. Carcel y Servicio, in which his case is frequently mentioned, in particular the subhuman prison conditions leading to his infection with hepatitis and the aggravation of his chronic asthma attacks and the responsibility of the prison doctor J.A.B. for these conditions.

7. The author's submissions were transmitted to the State party on 5 January 1993 and 26 August 1993. In its observations of 16 July 1993, the State party does not enter the merits of the case but merely refers to article 5, paragraph 2 (b), of the Optional Protocol, indicating that the author has not availed himself of local remedies to solicit the return of his property and compensation for his imprisonment.

8.1 In a further submission dated 6 September 1993, the author comments on the State party's observations, referring to Decree No. 185 of 29 November 1979, pursuant to which the judgments of the Tribunales Especiales de Justicia were not subject to appeal or cassation. Thus, the exhaustion of local remedies was completed with the handing down of the 30-year sentence against him by the revolutionary tribunal. The author's release from imprisonment after 10 years of deprivation and abuse does not close the book on the violation of his rights under the International Covenant on Civil and Political Rights.

8.2 With regard to the issue of impunity, the author points out that the State party has not initiated any prosecution against named torturers of the prior regime and that these named persons are living in Nicaragua with perfect impunity, although their crimes have been denounced and documented. The author further alleges that the State party has failed to initiate investigation of these cases.

8.3 On 16 June 1994, the State party reiterated its position that the author has not exhausted domestic remedies as required by article 5, paragraph 2 (b), of the Optional Protocol. No submissions on the merits of the author's allegations were made.

8.4 With regard to the author's allegations that the ad hoc tribunals in Nicaragua are not impartial, the State party states that the Government has no power to intervene in their deliberations or decisions.

8.5 The State party affirms that human rights are today respected in Nicaragua and refers to the fact that the 1993 session of the Organization of American States and the ninth Interamerican Indigenous Congress were held in Nicaragua, thus manifesting that the international community recognizes Nicaragua's democratic legal order.

The Committee's views on the merits

9.1 The Committee has taken due note of the State party's submission that the author has failed to exhaust domestic remedies, since he can now address his complaints to the competent courts of the present Government of Nicaragua.

9.2 Even though the State party has not specifically invoked article 93, paragraph 4, of the Committee's rules of procedure, the Committee has *ex officio* reviewed its decision of 20 March 1992 in the light of the State party's arguments. The Committee welcomes the State party's readiness to examine the author's complaints and considers that such examination could be seen as a remedy under article 2, paragraph 3, of the Covenant. However, for purposes of article 5, paragraph 2 (b), of the Optional Protocol, the Committee considers that the author, who was arrested in 1979 and spent 10 years in detention, cannot, at this stage, be required to engage the Nicaraguan courts of the present administration before his case can be examined under the Optional Protocol. In this context, the Committee recalls that the communication was submitted to the Committee in 1988, at a time when domestic remedies were not available or not effective. Even if domestic remedies may now be available, the application of such remedies would entail an unreasonable prolongation of the author's quest to be vindicated for his detention and alleged ill-treatment; the Committee concludes that the Optional Protocol does not require the author, in the circumstances of his case, to further engage the Nicaraguan courts. Moreover, the Committee reiterates its finding that the criteria of admissibility under the Optional Protocol were satisfied at the time of submission of the communication and that there is no reason to set aside the Committee's decision of 20 March 1992.

9.3 The Committee has considered the communication in the light of all the information made available to it by the parties, as required under article 5, paragraph 1, of the Optional Protocol. The Committee regrets the absence of any submission by the State party concerning the substance of the matter under consideration. Pursuant to article 4, paragraph 2, of the Optional Protocol, a State party should investigate in good faith all the allegations of violations of the Covenant made against it and make available to the Committee all the information at its disposal. In the absence of any State party submission on the merits of the case, due weight must be given to the author's allegations, to the extent that they have been substantiated.

10.1 With regard to the author's allegation concerning the confiscation of his property, the Committee recalls that the Covenant does not protect the right of property, as such. However, an issue under the Covenant may arise if a confiscation or expropriation is based on discriminatory grounds prohibited in article 26 of the Covenant. Although the author has stated that his property was confiscated as a consequence of his belonging to a category of persons whose political views were contrary to those of the Sandinista Government, and in a fashion that could be termed discriminatory, the Committee does not have sufficient facts before it to enable it to make a finding on this point.

10.2 In its prior jurisprudence the Committee has found that interference within a prisoner's correspondence may constitute a violation of article 17 of the Covenant. However, in the instant case the Committee lacks sufficient information to make a finding concerning a violation of the author's right to privacy under this provision.

10.3 With regard to the author's allegations that he was subjected to arbitrary detention, the Committee notes that the State party has not disputed the author's description of the reasons for his detention, i.e. his political opinions contrary to those of the Sandinista Government. The Committee has also taken note of the many annexes to the author's submissions, including the relevant report from the Nicaraguan Departamento de Seguridad del Estado and the evaluation of the case by Amnesty International. In the light of all the information before it, the Committee finds that the author's arrest and detention violated article 9, paragraph 1, of the Covenant.

10.4 As to the author's allegations that he was denied a fair trial, the Committee finds that the proceedings before the Tribunales Especiales de Justicia did not offer the guarantees of a fair trial provided for in article 14 of the Covenant. In particular, the Committee observes that the author's allegation that he was repeatedly put under duress to sign a confession against himself, in contravention of article 14, paragraph 3 (g), has not been contested by the State party.

10.5 With regard to the author's allegations of having been subjected to torture and ill-treatment, the Committee observes that the author's submissions are very detailed and that he mentions the names of the officers who ordered, participated in or were ultimately responsible for the ill-treatment. Moreover, the author has named numerous witnesses of the alleged mistreatment. In the circumstances and bearing in mind that the State party has not disputed the author's allegations, the Committee finds that the information before it sustains a finding that the author was a victim of a violation of articles 7 and 10, paragraph 1, of the Covenant.

10.6 The Committee considers violations of articles 7 and 10, paragraph 1, of the Covenant to be extremely serious, and requiring prompt investigation by States parties to the Covenant. In this context, the Committee refers to its general comment No. 20 (44) on article 7, b/ which reds in part:

> "Article 7 should be read in conjunction with article 2, paragraph 3 ... The right to lodge complaints against maltreatment prohibited by article 7 must be recognized in the domestic law. Complaints must be investigated promptly and impartially by competent authorities so as to make the remedy effective ...
>
> "... States may not deprive individuals of the right to an effective remedy, including compensation and such full rehabilitation as may be possible."

In this respect, the State party has indicated that the author may institute actions before the Nicaraguan courts. Notwithstanding the possible viability of this avenue of redress, the Committee finds that the responsibility for investigations falls under the State party's obligation to grant an effective remedy.

11. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol, is of the view that the facts before it disclose violations of articles 7, 9, paragraph 1, 10, paragraph 1, and 14, paragraph 3 (g), of the Covenant.

12. The Committee is of the view that Mr. Roberto Zelaya Blanco is entitled, under article 2, paragraph 3 (a), of the Covenant to an effective remedy. It urges the State party to take effective measures (a) to grant appropriate compensation to Mr. Zelaya for the violations suffered, also pursuant to article 9, paragraph 5, of the Covenant; (b) to carry out an official investigation into the author's allegations of torture and ill-treatment during his detention; and (c) to ensure that similar violations do not occur in the future.

13. The Committee would wish to receive information, within 90 days, on any relevant measures adopted by the State party in respect of the Committee's views.

[Adopted in English, French and Spanish, the English text being the original version.]

Notes

a/ Amnesty International, Nicaragua: Derechos Humanos 1986-1989 (London, November 1989), pp. 13-4.

b/ Adopted at the Committee's forty-fourth session, in 1992; see Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40 (A/47/40), annex VI.A,, paras. 14 and 15.

D. Communication No. 330/1988, Albert Berry v. Jamaica (views adopted on 7 April 1994, fiftieth session)

Submitted by:	Albert Berry (represented by counsel)
Victim:	The author
State party:	Jamaica
Date of communication:	6 May 1988
Date of decision on admissibility:	16 October 1992

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 7 April 1994,

Having concluded its consideration of communication No. 330/1988, submitted to the Human Rights Committee by Mr. Albert Berry under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, his counsel and the State party,

Adopts its views under article 5, paragraph 4, of the Optional Protocol.

1. The author of the communication is Albert Berry, a Jamaican citizen, born in 1964, awaiting execution at St. Catherine District Prison, Jamaica. He claims to be the victim of violations by Jamaica of articles 6, paragraph 1, 7, 9, paragraphs 3 and 4, 10, paragraphs 1 and 2 (a), 14, paragraphs 1, 3 (b) to (e) and (g) and 5, and 17 of the International Covenant on Civil and Political Rights. He is represented by counsel.

The facts as submitted by the author

2.1 On 27 March 1984, the author was arrested on a murder charge. The preliminary hearing was held on 15 June 1984. On 30 January 1985, after a three-day trial, the author was convicted and sentenced to death in the St. Ann's Circuit Court. He appealed to the Jamaican Court of Appeal on 5 February 1985. The appeal was dismissed on 21 October 1987. The Court of Appeal produced its written judgement on 11 November 1987. The author subsequently petitioned the Judicial Committee of the Privy Council for special leave to appeal. On 17 May 1990, the Judicial Committee refused leave to appeal. With this, it is submitted, available domestic remedies have been exhausted.

2.2 The author was charged with the murder of one D. G. The case for the prosecution was that, on 23 March 1984 at about 8 p.m., a group of 11 men, including D. G., were walking along the unlit main road at Maider, Parish of St. Ann. One or two of the men carried flashlights, one of which was lit. They suddenly came upon the author and two or three other unidentified men, who blocked the road and opened fire. One shot hit D. G. in the back.

2.3 The prosecution relied solely on identification evidence given by four witnesses who allegedly belonged to a rival gang. The defence was based on alibi.

2.4 According to the prosecution witnesses, the flashlight carried by one member of the group illuminated the other group of men in front of them just prior to the shooting. Each of the witnesses purportedly recognized the author, whom they knew from childhood and who, according to their statements, apparently was not wearing a mask. The witnesses were unable to identify the other men, who were masked. It is stated that the witnesses gave contradictory evidence as to the number of men carrying flashlights; the number of assailants; whether the author carried a gun; the distance which separated the two groups; the lapse of time between the encounter with the assailants and the burst of gunfire; how long the gunfire lasted; the position of the author within the group of assailants; and the number of shots fired. Furthermore, it is stated that no evidence was produced that it was the author who fired the shot(s), and no motive for the shooting, or for the murder of D. G., was adduced.

2.5 The author states that during the preliminary inquiry, N. W., the police officer in charge of the investigation, who came to his cell nearly every day, and another unidentified police officer, forced him to sign a prepared statement, in which he reportedly admitted that he was in the company of the three men who shot the deceased. It appears, however, that the prosecution did not seek to produce as evidence said statement. It was not until N. W. (being the last witness for the prosecution) was called and re-examined that the issue of the alleged admission made by the author came up. Author's counsel did not raise any objection against N.W.'s evidence in this respect.

2.6 It further appears that counsel for the appeal argued that the trial judge had erred in admitting this evidence which, he submitted, was highly prejudicial to the author and which was of no probative value. The Court of Appeal, however, dismissed this ground of appeal, stating that:

> "The admission in the instant case provided powerful corroboration of the evidence of visual identification, and its probative value could be of telling effect. There was never any suggestion that the statement made by the applicant after caution was other than voluntary, and it ill behoves the applicant to make no objection to the admission of the statement at the trial, and now to rely upon its allegedly prejudicial effect. We hold that the evidence of N.W. as to the admission made by the applicant was relevant and probative and was properly admitted."

2.7 The author was represented by legal aid attorneys during the preliminary hearing and on appeal. It appears from the AC Form 2 ("Particulars of Trial") that he was represented by a privately retained lawyer during the trial. A London law firm represented him pro bono before the Judicial Committee of the Privy Council.

The complaint

3.1 Counsel, in a submission of 22 June 1992, notes that there have been no executions in Jamaica since March 1988; the Government of Jamaica also considered abolishing the death penalty in Jamaica as confirmed by solicitors to the State party in 1990. Counsel further contends that under the provisions of "the Bill to amend The Offences Against The Person Act" (which at the time was being considered by the Jamaican Parliament), the author would regain his freedom under the relevant parole provisions since he has served more than seven years and he has not been convicted of a capital crime within the meaning of the Bill. a/ It is stated that, in the light of the above, the author should have a reasonable expectation not only that his sentence will be commuted, but that he will be released. Counsel submits that the author's execution would constitute an arbitrary deprivation of life contrary to article 6, paragraph 1, of the Covenant and that, in the circumstances, the renewed threat of execution could amount to a violation of article 7 of the Covenant.

3.2 Article 7 is further said to have been violated by N. W., who allegedly threatened to shoot the author if no confession statement was forthcoming. Finally, it is submitted that the constant stress and anxiety suffered as a result of prolonged detention on death row, as well as the conditions of the author's imprisonment at St. Catherine District Prison, constitute a separate violation of article 7.

3.3 The author alleges that he was not cautioned by the police before his interrogation. Counsel points out that the author was detained for two and a half months before he was brought before an examining magistrate. During that time, the author did not benefit from legal representation. This, coupled with the fact that it took another seven and a half months before the author was tried, is said to amount to a violation of article 9, paragraphs 3 and 4, of the Covenant.

3.4 The author alleges a violation of article 10, paragraphs 1 and 2 (a). He claims that during the 10 months of his pre-trial detention at Brown's Town Police Station, he was not segregated from convicted persons and was not subject to separate treatment appropriate to his status as an unconvicted person. He further claims that during that period, he was kept chained. Furthermore, he alleges that he was hit in the face by a policeman on one of the three days of his trial when he was brought back to his cell, and that he has been exposed to random brutality by the prison guards on death row.

3.5 It is stated that on the first day of the trial, the author's attorney was not present in court. On that occasion, the author was represented by the attorney's assistant, one Mr. S. It is submitted that the author complained to Mr. S. about the foreman of the jury, whom he believed to be prejudiced against him. Mr. S., however, raised no objections. Counsel submits the transcript of a letter, dated 22 January 1988, from the author's mother to the author, from which it would appear that the foreman was bribed to ensure that the author was convicted. Furthermore, it is submitted that the four prosecution witnesses had a grudge against Mr. Berry. They allegedly belonged to a gang who terrorized the community where the author lived, and had tried to kill him more than once.

3.6 Counsel, while conceding that it is not in principle for the Committee to evaluate facts and evidence in a particular case or to review specific instructions by the judge to the jury, contends that the Committee's reservations thereon have so far been confined to instructions by the judge to the jury. Counsel argues that, in the circumstances of the author's case, the presence in the jury of a biased person is a matter that warrants examination by the Committee.

3.7 The author claims that, during the preliminary hearing and on appeal, he was not represented by counsel of his choosing, and that he did not have adequate time and facilities for the preparation of his defence, in breach of article 14, paragraph 3 (b) of the Covenant. He indicates that only on the day the preliminary hearing began did the examining magistrate appoint a lawyer. As a result, he had only one hour and forty minutes to communicate with his lawyer. As to his appeal, the author states that he was again assigned a lawyer without his consent; he submits that he only met once with this lawyer, for fifteen minutes, between 21 and 25 February 1988, about four months after losing his appeal. Finally, the author claims that he did not have time and facilities for the preparation of his trial. He affirms that he met with his attorney only three times before the trial, each time for no more than thirty minutes. During the trial, the attorney met with him only a few times.

3.8 Counsel points out that the author filed his application for leave to appeal on 5 February 1985 and that his legal representative filed the supplementary grounds of appeal on 20 October 1987, only one day before the Court of Appeal hearing took place. It is submitted that the lapse of time between the filing of the original grounds and that of the supplementary grounds of appeal was the result of the fact that the author did not have the assistance of a lawyer, and that the delay in the hearing of the appeal (more than two and a half years) amounts to a violation of article 14, paragraph 3 (c), of the Covenant.

3.9 The author complains that he was excluded from the hearing of his appeal, in breach of article 14, paragraph 3 (d), despite the fact that he had expressed his wish to be present in court. Counsel notes that an appellant is not entitled to be present at the hearing of an application for leave to appeal, but that in the author's case the hearing of the application for leave to appeal was treated as the hearing of the appeal, and he would thus have been entitled to be present. Furthermore, counsel submits that as the author did not have the opportunity to instruct his representative for the appeal prior to the hearing, and as his attorney at the trial failed to raise the issues of the foreman of the jury and the author's ill-treatment by the police, the author was denied an effective appeal, in breach of article 14, paragraph 5. Counsel refers to the Committee's views on communication No. 248/1987 (Glenford Campbell v. Jamaica), b/ where it held that the combined effect of the lawyer's failure to bring the defendant's maltreatment before the court, the consequences that failure had on the conduct of the appeal and the lack of an opportunity to instruct counsel for the appeal or to defend himself in person, amounted to a denial of effective representation in the judicial proceedings and non-compliance with the requirements of article 14, paragraph 3 (d), of the Covenant.

3.10 As to article 14, paragraph 3 (e), it is submitted that during the trial the author was denied the right to have his mother and three of his sisters examined as witnesses for the defence. It is further submitted that counsel ignored the author's instructions to call witnesses other than his brother-in-law.

3.11 Concerning the allegation that Mr. Berry was forced to sign a confession, in breach of article 14, paragraph 3 (g), counsel submits numerous letters addressed to the relevant Jamaican authorities, requesting them to make available copies of the depositions used at, and the transcript of, the author's preliminary hearing. He explains that one of the reasons for doing so has been to identify to what extent statements made by the witnesses at the trial differed from their statements at the preliminary hearing. Counsel complains that all his endeavours to obtain said documents have been futile.

3.12 Finally, the author claims that the warders at St. Catherine District Prison have repeatedly interfered with his correspondence, in violation of article 17, paragraph 1. He contends that books sent to him have been withheld and that his letters sent through the prison office have never reached the addressees. In this context, it is submitted that, in May of 1991, inmates found a room packed with letters and documents from and to death row prisoners. The author reportedly complained to the Parliamentary Ombudsman about this finding but has not received any reply to date. This is said to amount to a violation of article 17, paragraph 2, of the Covenant.

3.13 With respect to the requirement of exhaustion of domestic remedies, it is submitted that an application to the Supreme (Constitutional) Court would not be an available and effective remedy in the author's case, as legal aid is not given for this purpose and the author himself does not have the means to secure legal representation in Jamaica to see a constitutional motion argued on his behalf.

The State party's observations

4. In its submission, dated 18 April 1989, the State party contended that the communication was inadmissible because of non-exhaustion of domestic remedies, since at the time of the submission it was still open to the author to petition the Judicial Committee of the Privy Council. On 1 July 1992, a further submission from author's counsel with fresh allegations was transmitted to the State party, providing it with the opportunity to comment on the admissibility of these new claims. The State party's comments in this respect were only received after the Committee declared the communication admissible (see para. 6.1 below).

The Committee's decision on admissibility

5.1 During its forty-sixth session, the Committee considered the admissibility of the communication. It noted that the author's petition for special leave to appeal to the Judicial Committee of the Privy Council had been dismissed, and that the State party had not, at that time, raised any further objections in respect of the admissibility of the communication.

5.2 With regard to the author's claims under article 17, the Committee considered that they had not been substantiated, for purposes of admissibility, and that, in this respect, the author had no claim within the meaning of article 2 of the Optional Protocol.

5.3 On 16 October 1992, the Committee declared the communication admissible in so far as it appeared to raise issues under articles 6, 7, 9, paragraphs 3 and 4, 10 and 14 of the Covenant.

The State party's request for review of admissibility and information on the merits of the communication

6.1 In its submission dated 26 October 1992 (received only after the Committee declared the communication admissible), the State party argues that the communication is inadmissible because of non-exhaustion of domestic remedies. It states that the rights under the Covenant which allegedly are violated in the author's case are similar to those contained in the Jamaican Constitution. Under section 25 of the Constitution, it would be open to the author to seek redress for the alleged violations of his constitutional rights before the Supreme (Constitutional) Court of Jamaica.

6.2 Moreover, with regard to the alleged violations of article 9, paragraphs 3 and 4, of the Covenant, the State party argues that, at all times during his detention, the author could have applied to the courts for a writ of habeas corpus to have the reasonableness of his detention tested. It is submitted that the author's failure to avail himself of this remedy cannot be attributed to the State party.

6.3 The State party notes that "the author's complaints under article 14, paragraph 1, relate to the conduct of the trial including jury selection and bias of prosecution witnesses". It further contends that "the alleged breach of article 14, paragraph 3 (g), relates to the authenticity of a confession statement, which is a matter of evidence". With reference to the Committee's jurisprudence, the State party submits that these claims fall outside the scope of the Committee's competence.

7.1 In its submission of 1 July 1993, the State party reiterates that the communication should be considered inadmissible because of non-exhaustion of domestic remedies and requests the Committee to review its decision of 16 October 1992 accordingly. With regard to the substance of the matter under consideration, it provides the following comments: as to the author's claims under article 14, paragraph 3 (b) of the Covenant, the State party submits that the material presented to the Committee does not disclose that at any time during the proceedings either counsel or the author complained to the trial judge or the Court of Appeal that the time or facilities allowed for the preparation of the defence were inadequate.

7.2 With regard to the adequacy of the author's representation, the State party argues that the facts relied upon by the author are all attributable to his legal representative, who determined, according to his professional skills, what issues were important in the conduct of the defence.

7.3 In so far as the allegation of denial of the right to be present in court is concerned, the State party asserts that at no time did the author or his counsel indicate to the Court of Appeal that he wished to be present at the hearing of the appeal.

7.4 Finally, with regard to the author's allegation that he was denied the right to have his conviction and sentence reviewed by a higher tribunal, the State party contends that Mr. Berry is estopped from making this assertion, as he exercised this right by appealing to the Court of Appeal and to the Judicial Committee of the Privy Council.

Counsel's comments

8.1 In a submission of 16 September 1993, counsel states that Mr. Berry was notified in December 1992 that his case had been reviewed by a judge of the Court of Appeal pursuant to section 7 (2) of the Offences against the Person (Amendment) Act 1992, and that his case had been classified as a capital murder case pursuant to section 2 (1) (f) of the Act. Section 2 (1) (f) states as follows:

> "Any murder committed by a person in the cause or furtherance of an act of terrorism, that is to say, an act involving the use of violence by that person which, by reason of its nature and extent, is calculated to create a state of fear in the public or any section of the public ... shall be a capital murder".

Counsel points out that his client was indicted for murder only and subsequently convicted thereof, and that the issue of terrorism was never raised during the judicial proceedings; he argues that a subsequent addition of a charge of terrorism to his client's murder charge violates the principle of due process of law. Counsel adds that, on 8 January 1993, he applied to the Court of Appeal for review of the classification in Mr. Berry's case; the application is currently pending before the Court of Appeal. c/ Counsel submits that the above is further evidence in substantiation of the claims that the author is the victim of violations by the State party of articles 6 and 7.

8.2 With reference to the alleged breach of article 14, paragraph 3 (g) (see para. 3.11 above), counsel forwards a letter, dated 7 May 1993, from the Registrar of the Supreme Court, informing him that the authorities of the Magistrate's Court are unable to locate the depositions made at the preliminary hearing in the author's case. It is submitted that because of the State party's failure to produce the requested documents, it is impossible for the author further to substantiate his claims that the prosecution witnesses were biased and that he was forced by the police to sign a statement.

Review of admissibility

9.1 The Committee has taken note of the State party's arguments on admissibility, and of counsel's information regarding the classification review procedure in Mr. Berry's case, both submitted after the Committee's decision declaring the communication admissible.

9.2 With regard to the State party's contention that constitutional remedies are still open to the author, the Committee recalls that domestic remedies within the meaning of the Optional Protocol must be both available and effective. The Committee considers that in the absence of legal aid, a constitutional motion does not, in the specific circumstances of the instant case, constitute an available remedy within the meaning of article 5, paragraph 2 (b), of the Optional Protocol, which the author must exhaust. d/

9.3 As to counsel's claim that the author's execution would constitute an arbitrary deprivation of life contrary to article 6, paragraph 1, and that the "renewed threat of execution" would be in violation of article 7, the Committee notes that these issues are related to the classification of the author's case under the Offences against the Person (Amendment) Act 1992. The Committee further notes that an application for review of the classification in the case remains pending before the Court of Appeal of Jamaica. On the basis of this new information, the Committee decides not to proceed with the consideration of this part of the communication.

9.4 The Committee, therefore, revises its decision on admissibility in part and considers this part of the communication (see para. 3.1 above) to be inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

Examination of the merits

10. In the light of the above, the Committee decides to proceed with its examination of the merits of the communication in so far as it relates to the remaining allegations under article 7 and in so far as it raises issues under articles 9, paragraphs 3 and 4, 10 and 14 of the Covenant.

11.1 In respect of the allegations pertaining to article 9, paragraphs 3 and 4, the State party has not contested that the author was detained for two and a half months before he was brought before a judge or judicial officer authorized to decide on the lawfulness of his detention. Instead, the State party has confined itself to the contention that, during his detention, the author could have applied to the courts for a writ of habeas corpus. The Committee notes, however, the author's claim, which remains unchallenged, that throughout this period he had no access to legal representation. The Committee considers that a delay of over two months violates the requirement, in article 9, paragraph 3, that anyone arrested on a criminal charge shall be brought "promptly" before a judge or other officer authorized by law to exercise judicial power. In the circumstances, the Committee concludes that the author's right under article 9, paragraph 4, was also violated, since he was not, in due time, afforded the opportunity to obtain, on his own initiative, a decision by a court on the lawfulness of his detention.

11.2 The Committee notes that the author's claims under article 10 of the Covenant, in respect of his treatment in pre-trial detention and in respect of his treatment on death row (see para. 3.4 above) have not been contested by the State party. In the absence of a response from the State party, the Committee will give appropriate weight to the author's allegations that, during the 10 months of his pre-trial detention at Brown's Town Police Station, he was not segregated from convicted persons, was not subject to separate treatment appropriate to his status as an unconvicted person and was kept chained. Furthermore, he was hit in the face by a policeman on one of the days of his trial when he was brought back to his cell. In the opinion of the Committee, therefore, he was not treated in accordance with article 10, paragraphs 1 and 2 (a), of the Covenant. As to the author's claim that he has been exposed to random brutality on death row, the Committee notes that no further details have been offered on this claim. It therefore finds no violation of article 10 in this respect.

11.3 As to the author's claim that he did not receive a fair trial, under article 14 of the Covenant, because of the presence in the jury of an allegedly biased person and the use of evidence against him which was allegedly obtained under duress, the Committee observes that these issues were not raised during the trial. Furthermore, the written judgement of the Court of Appeal reveals that the issue of self-incrimination without prior cautioning by the police was raised during the trial, when N. W. testified that the author had made his statement after police cautioning. Neither counsel nor the author contended at the trial that he had not been cautioned. The Committee is of the opinion that the failure of the author's representative to bring these issues to the attention of the trial judge, which purportedly resulted in the negative outcome of the trial, cannot be attributed to the State party, since the lawyer was privately retained. The Committee, therefore, finds no violation of article 14, paragraph 1, of the Covenant in this respect.

11.4 The right of an accused person to have adequate time and facilities for the preparation of his defence at trial is an important element of the guarantee of a fair trial and an important aspect of the principle of equality of arms. In cases in which a capital sentence may be pronounced on the accused, it is axiomatic that sufficient time must be granted to the accused and his counsel to prepare the defence for the trial. The determination of what constitutes adequate time requires an assessment of the individual circumstances of each case. The author also contends that he was unable to obtain the attendance of witnesses other than his brother-in-law. The Committee notes, however, that the material before it does not reveal that either counsel or the author himself complained to the trial judge that the time or facilities for the preparation of the defence had been inadequate. If counsel or the author felt that they were not properly prepared, it was incumbent upon them to request an adjournment. Furthermore, there is no indication that counsel's decision not to call other witnesses was not based on the exercise of his professional judgement, or that, if a request to call the author's mother and sisters to testify had been made, the judge would have disallowed it. Accordingly, there is no basis for a finding of a violation of article 14, paragraphs 3 (b) and (e), in respect of the trial.

11.5 As to the author's claim in respect of the delay in the hearing of his appeal, the Committee notes that the author's application for leave to appeal to the Court of Appeal, dated 5 February 1985, indicates that he wished the Court to assign legal aid to him. However, it also appears from the application that the author answered the question whether he had any means to obtain a legal representative himself in the affirmative. On the basis of the information before it, the Committee is unable to ascertain whether or not the delay in the filing of the supplementary grounds of appeal was attributable to the author himself. In this context, the Committee notes that the author has not indicated when he informed the judicial authorities that he did not have the means to privately retain a lawyer and when he learned that legal aid counsel had been assigned to him.

11.6 As to the author's claims under article 14, paragraphs 3 (b), (d) and 5, concerning the conduct of his appeal, the Committee begins by noting that a lawyer was assigned to the author for purposes of his appeal, and that article 14, paragraph 3 (d), does not entitle an accused to choose counsel provided to him free of charge. The Committee further notes that the author's claim that he did not have the opportunity to instruct counsel for the appeal prior to the hearing has not been contested by the State party. In communication No. 248/1987 (Glenford Campbell v. Jamaica), b/ the Committee held that the combined effect of the lawyer's failure to raise objections at the trial in respect of the confessional evidence allegedly obtained through maltreatment, the consequences this failure had on the conduct of the appeal and the lack of an opportunity to instruct counsel for the appeal or to defend himself in person amounted to a denial of effective representation in the judicial proceedings and non-compliance with the requirements of article 14, paragraph 3 (d), of the Covenant. The Committee notes, however, that in the present case the author would not have been allowed, unless special circumstances could be shown, to raise issues on appeal that had not previously been raised by counsel in the course of the trial. In the circumstances, and taking into account that the author's appeal was in fact heard by the Court of Appeal, the Committee finds no violation of article 14, paragraphs 3 (b), (d) and 5, of the Covenant.

11.7 As to the claim under article 14, paragraph 3 (g), juncto article 7, the Committee recalls that the wording of article 14, paragraph 3 (g), that no one shall be "compelled to testify against himself or to confess guilt", must be understood in terms of the absence of any direct or indirect physical or psychological pressure from the investigating authorities on the accused with a view to obtaining a confession of guilt. A fortiori, it is unacceptable to treat an accused person in a manner contrary to article 7 of the Covenant in order to extract a confession. The Committee notes that, in the present case, the author claims that the investigating officer, N. W., threatened to shoot him and forced him to sign a prepared statement; this claim has not been contested by the State party. On the other hand, the Committee notes that N. W. testified during the trial that the author had made his statement after police cautioning. The Committee observes that, in order to reconcile these different versions, the written depositions made and used during the preliminary hearing were required. The Committee further observes that counsel has requested the State party, on several occasions, to make available to him the transcript of the author's preliminary hearing, including the depositions of witnesses, and that finally, after several reminders, he was informed by the judicial authorities that they were unable to locate them. These allegations have not been denied by the State party and therefore due weight must be given to the author's claims. In this respect, therefore, the Committee finds a violation of article 14, paragraph 3 (g), juncto article 7, of the Covenant.

11.8 With regard to the claim that Mr. Berry's prolonged stay and the conditions of detention on death row constitute cruel, inhuman or degrading treatment, the Committee notes that these issues have not been further substantiated. The Committee recalls its jurisprudence that authors must substantiate allegations of violations of their Covenant rights under the Optional Protocol; mere affirmations unbuttressed by substantiating evidence do not suffice. In this case, the author has failed to show that he is the victim of a violation by the State party of article 7 of the Covenant on account of his prolonged detention on death row.

12. The Committee is of the opinion that the imposition of a sentence of death upon the conclusion of judicial proceedings in which the provisions of the Covenant have not been respected constitutes, if no further appeal against the sentence is available, a violation of article 6 of the Covenant. In the instant case, while a constitutional motion to the Supreme (Constitutional) Court might in theory still be available, it would not be an available remedy within the meaning of article 5, paragraph 2 (b), of the Optional Protocol, for the reasons set out in paragraph 9.2 above. As the Committee observed in its general comment 6 (16), the provision that a death sentence may be imposed only in accordance with the law and not contrary to the provisions of the Covenant implies that "the procedural guarantees therein prescribed must be observed, including the right to a fair hearing by an independent tribunal, the presumption of innocence, the minimum guarantees for the defence and the right to review by a higher tribunal". e/ Accordingly, it may be concluded that the final sentence of death was passed without having met the requirements of article 14, and that as a result the right protected by article 6 of the Covenant has been violated.

13. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, finds that the facts before it disclose violations of articles 6, 9, paragraphs 3 and 4, 10, paragraphs 1 and 2 (a), and 14, paragraph 3 (g) *juncto* article 7, of the Covenant.

14. The Committee is of the view that Mr. Albert Berry is entitled to an appropriate remedy entailing his release. It requests the State party to provide information, within 90 days, on any relevant measures taken by the State party in compliance with the Committee's views.

[Adopted in English, French and Spanish, the English text being the original version.]

Notes

a/ On 25 September 1992, the Offences against the Person (Amendment) Act 1992 was passed in the Senate. The Act provides for the classification of the cases of persons under sentence of death for murder into "capital" or "non-capital" murder. Classification as "capital" makes the death penalty mandatory; classification as "non-capital" will commute the death sentence to life imprisonment. In the latter case, the court may decide to grant parole after a period not less than seven years. In December 1992, the classification (by a single judge of the Court of Appeal) procedure began; contrary to counsel's expectations, the offence for which Mr. Berry was convicted was classified as a capital offence.

b/ See Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40 (A/47/40), annex IX.D; views adopted on 30 March 1992 at the forty-fourth session, para. 6.6.

c/ The review process under the Act is currently stayed pending the outcome of a constitutional motion in another case, which challenges the constitutionality of the classification procedure established by the Act.

d/ See also the Committee's views in communications Nos. 230/1987 (Raphael Henry v. Jamaica) and 283/1988 (Aston Little v. Jamaica) adopted on 1 November 1991; Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40 (A/47/40), annexes IX.B and J, paras 7.1 et seq.

e/ Official Records of the General Assembly, Thirty-seventh Session, Supplement No. 40 (A/37/40), annex V, general comment 6 (16), para. 7.

E. Communication No. 332/1988, Devon Allen v. Jamaica (views adopted on 31 March 1994, fiftieth session)

Submitted by: Devon Allen (represented by counsel)

Victim: The author

State party: Jamaica

Date of communication: 20 October 1988 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 31 March 1994,

Having concluded its consideration of communication No. 332/1988, submitted to the Human Rights Committee on behalf of Mr. Devon Allen under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, his counsel and the State party,

Adopts its views under article 5, paragraph 4, of the Optional Protocol.

1. The author of the communication is Devon Allen, a Jamaican citizen born in 1962, currently awaiting execution at St. Catherine District Prison, Jamaica. He claims to be a victim of violations by Jamaica of articles 6, paragraph 5, 7, 9, paragraphs 2 and 3, 10, and 14, paragraphs 3 (b), (c), (d) and (e) of the International Covenant on Civil and Political Rights. He is represented by counsel. The crime of which the author was convicted has been classified as a capital offence under the Offences Against the Person (Amendment) Act 1992.

The facts as submitted by the author

2.1 Devon Allen was arrested on 18 August 1982, while he was in hospital recovering from injuries sustained in a shooting incident. He was charged with the murder, on 26 September 1980, i.e., nearly two years earlier, of one W. H. He was tried in the Home Circuit Court of Kingston between 10 and 17 May 1983, found guilty as charged and sentenced to death. On 10 November 1983, the Court of Appeal of Jamaica dismissed his appeal. The Court of Appeal did not issue a reasoned judgement but merely a "Note of Oral Judgement", also dated 10 November 1983. A further application for special leave to appeal to the Judicial Committee of the Privy Council has not been filed.

2.2 The evidence presented against Mr. Allen was that on 26 September 1980 at about 1.30 a.m., two men went to W. H.'s house in Kingston, climbed onto a roof, jumped into the yard and approached the room where W. H. was sleeping. The wife of W. H. testified that one of the men shot her husband through the half-open window; both men then broke into the house, took the television set and ran off. This was reported to the police the following morning.

2.3 During the trial, W. H.'s wife and her son, who was eight years old when the crime was committed, testified as the prosecution's principal witnesses. Both identified the author as the man who had shot W. H. Mrs. H. testified that she had known the author for several years. but under his nickname "Dap-si-Do" only. She further contended that eight days after the crime, the author had returned to her house and that, subsequently, she had occasionally seen him walking around the area.

2.4 The author denied responsibility for the shooting of W. H., claiming that he was not in the neighbourhood on the night in question and that his nickname was not "Dap-si-Do" but "Windward". He notes that the arresting officer at the hospital asked him whether he was "George Green, known as Dap-si-Do". Counsel further encloses an affidavit signed in May 1988 by the author's brother, Steve Allen, in which he indicates that in his presence and that of a person investigating the circumstances of W. H.'s death, one B. N. admitted having shot W. H. on the night in question. This was brought to the attention of the Attorney-General's Office, but the case was not reopened, as B. N. had gone into hiding and could no longer be located by the police.

2.5 In respect of the requirement of exhaustion of domestic remedies, counsel contends that delays encountered in the case justify the conclusion that domestic remedies have been "unreasonably prolonged" within the meaning of article 5, paragraph 2 (b), of the Optional Protocol. He contends that a petition for special leave to appeal to the Judicial Committee of the Privy Council based on the issue of delay would inevitably fail, because of the similarities between the author's case and that of another Jamaican citizen, Howard Martin, whose petition was dismissed by the Privy Council on 11 July 1988. a/ Besides, leading counsel has advised that there are no proper grounds to argue a petition for special leave to appeal to the Judicial Committee.

2.6 Still in the context of domestic remedies, counsel refers to the Privy Council's jurisprudence (judgement in the case of Riley et al. v. Attorney-General of Jamaica), which holds that whatever the reasons for, or length of, delays in executing a sentence of death lawfully imposed, such delays can afford no ground for holding the execution to be in contravention of section 17 of the Jamaican Constitution. He observes that the Court of Appeal and the Supreme Constitutional Court of Jamaica would consider themselves to be bound by this jurisprudence, and that no decision in the case could be taken unless and until an appeal to the Judicial Committee of the Privy Council were allowed or made. According to counsel, the pursuit of remedies under the Jamaican Constitution and thereafter to the Judicial Committee would take many years.

The complaint

3.1 The author contends that he did not receive a fair and impartial trial. Thus, in relation to article 14, paragraph 3 (e), the trial transcript reveals that no witnesses were called on his behalf and no evidence was adduced against his claim that he was not known by the nickname "Dap-si-Do" but instead "Windward". Nor was there any evidence to rebut his statement that from 26 September 1980 until his arrest nearly two years later, he remained in the area working as a barman, without ever being questioned about W. H.'s death. Without further elaborating on his claim under article 14, paragraphs 3 (b) and (d), he submits that legal assistance available to individuals charged with criminal offences in Jamaica is such that witnesses are rarely traced and expert witnesses are hardly ever subpoenaed.

3.2 The author further alleges a violation of article 14, paragraph 3 (c) (and subsidiarily of article 9, paras. 2 and 3) because of the judicial and administrative delays in the case, and argues that a delay of five years b/ in the execution of the sentence constitutes "cruel and inhuman treatment" in violation of article 7 of the Covenant.

3.3 Finally, counsel argues that the State party may have violated article 6, paragraph 5, of the Covenant, since the author testified, during the trial in May 1983, that he was 20 years old. Accordingly, it may be that he was under the age of 18 when the offence was committed.

The State party's information and observations

4. In its submissions under rule 91 of the rules of procedure, the State party contended that the communication was inadmissible because of non-exhaustion of domestic remedies, since the author had failed to petition the Judicial Committee of the Privy Council for special leave to appeal, pursuant to section 110 of the Jamaican Constitution.

The Committee's decision on admissibility

5.1 During its 44th session, the Committee considered the admissibility of the communication. With respect to the requirement of exhaustion of domestic remedies, it noted that the Court of Appeal of Jamaica had not issued a reasoned judgement in the case but confined itself to delivering a "Note of Oral Judgement". While taking note of the State party's contention that the Judicial Committee may hear petitions for leave to appeal even in the absence of a written judgement of the Court of Appeal, the Committee considered, basing itself on its jurisprudence, c/ that the Judicial Committee could not, in its practice, entertain petitions for leave to appeal which are not corroborated by a reasoned judgement of the Court of Appeal of Jamaica. In the circumstances, the Committee found that a petition to the Judicial Committee did not constitute a remedy that was both available and effective within the meaning of article 5, paragraph 2 (b), of the Optional Protocol.

5.2 In respect of the author's claim under article 7, the Committee observed that the characterization of prolonged detention on death row as cruel, inhuman and degrading treatment had not been placed before the Jamaican courts and that, accordingly, domestic remedies had not been exhausted.

5.3 As to the author's allegations under articles 6, paragraph 5, and 14, paragraphs 3 (c) and (e), the Committee considered that they had been substantiated and that they deserved consideration on the merits. The author's remaining allegations were not considered substantiated, for purposes of admissibility.

5.4 On 20 March 1992, therefore, the Committee declared the communication admissible in so far as it appeared to raise issues under articles 6, paragraph 5, and 14, paragraphs 3 (c) and (e), of the Covenant; it reserved the right to review its decision in respect of the author's claim under article 6, paragraph 5, of the Covenant.

The State party's further observations and request for review of admissibility and counsel's comments

6.1 In a submission dated 2 September 1992, the State party observes that there was no violation of article 6, paragraph 5, in the author's case: the birth certificate shows that the author was born on 21 June 1962 and that, accordingly, he was no longer a juvenile at the time of the commission of the offence (26 September 1980).

6.2 The State party reiterates that the communication is inadmissible on the ground of failure of exhaustion of domestic remedies, and that the author may petition the Judicial Committee of the Privy Council even in the absence of a written judgement of the Court of Appeal, under rules 3 and 4 of the rules of procedure of the Judicial Committee.

6.3 As to the claims under article 14, paragraphs 3 (c) and (e), the State party adds that it would further be open to the author to seek redress for an alleged breach of his rights under section 20 of the Jamaican Constitution, pursuant to section 25 thereof. The State party observes that the author has "in no way substantiated allegations [that] witnesses in his favour were not called and that the issue of whether he was correctly identified was not properly explored". In the State party's opinion, the issue of correct identification is one of evidence, the review of which is the function of an appellate court and not, save in exceptional circumstances, within the competence of the Committee.

7.1 In his comments, counsel concedes that Mr. Allen was an adult when the crime was committed.

7.2 Counsel affirms that the author does not have the means to instruct a lawyer to file a constitutional motion on the issue of delay and/or any other irregularity under the Jamaican Constitution. The Poor Prisoners' Defence Act does not provide for legal aid for this purpose, and no lawyer in Jamaica has been willing to file a motion on the author's behalf on a pro bono basis. Counsel reiterates that even if the author were in the position to file such a motion, Jamaican courts would consider themselves bound by the Riley precedent (see para. 2.6 above).

7.3 As to the availability of a petition for special leave to appeal to the Privy Council, counsel recalls that the Privy Council does not act as a simple appellate court, and that it will only grant leave to appeal upon evidence that a substantial miscarriage of justice has occurred. Simple misdirections (to the jury) by a judge are not sufficient. It is therefore submitted that there are no grounds on which to petition the Judicial Committee (see para. 2.5 above).

7.4 Finally, counsel reiterates that the delays in the judicial proceedings did not arise as a consequence of the author exercising his rights of appeal, but solely as a result of "maladministration" by the State party.

Review of admissibility and consideration of the merits

8.1 The Committee has taken note of the State party's further arguments on admissibility and of counsel's further information regarding the availability of constitutional remedies in Mr. Allen's case.

8.2 With regard to the State party's contention that constitutional remedies are still open to Mr. Allen, the Committee recalls that domestic remedies within the meaning of the Optional Protocol must be both available and effective. The Committee considers that, in the absence of legal aid provided by the State party and given that the author has not been able to secure legal assistance for this purpose, a constitutional motion does not, in the circumstances of the instant case, constitute an available remedy within the meaning of article 5, paragraph 2 (b), of the Optional Protocol, which the author must exhaust. The Committee, therefore, finds no reason to revise its decision on admissibility.

8.3 The Committee has considered the claims raised in the communication in the light of all the written information provided by the parties. In respect of the allegation of a violation of article 6, paragraph 5, the Committee observes that the State party has conclusively shown, and counsel conceded, that Mr. Allen was an adult when the crime of which he was convicted was committed. Accordingly, the Committee concludes that there has been no violation of article 6, paragraph 5.

8.4 The author contends that he did not have a fair trial within the meaning of article 14 of the Covenant, although he does not claim that the court was not impartial or the jury biased. Thus, he claims that no evidence was adduced by the prosecution to rebut his claim that he was not known by the nickname "Dap-si-Do" but as "Windward". He further observes that no evidence was put forth to rebut his testimony that from 26 September 1980 until his arrest in August 1982, he remained in the area working as a barman, without ever being questioned about W. H.'s death. The Committee observes that these claims essentially relate to the evaluation of the evidence by the domestic court. In this respect, it reiterates that it is generally for the appellate courts of States parties to the Covenant to evaluate the facts and evidence in a particular case, unless it is clear that the judge's instructions to the jury were arbitrary or amounted to a denial of justice, or that the judge violated his obligation of impartiality. After careful consideration of the material before it, the Committee concludes that the trial did not suffer from such defects. Accordingly, there is no violation of article 14, paragraph 1, in this respect.

8.5 The author alleges that the preparation and presentation of his defence were deficient, in that no witnesses were called on his behalf. More generally, he contends that legal assistance available to individuals charged with criminal offences in Jamaica is such that witnesses are rarely traced or subpoenaed (see para. 3.1 above). In respect of these claims, which were subsumed under article 14, paragraph 3 (e), in the admissibility decision of 20 March 1992, the Committee notes that the material before it does not disclose that either the author or his counsel complained to the judge that facilities for the preparation of the defence had been inadequate. Nor is there an indication that counsel decided not to call witnesses on Mr. Allen's behalf other than in the exercise of his professional judgement or that, if a request to call witnesses was made, the judge disallowed it or would have disallowed it. In the circumstances, the Committee finds no violation of article 14, paragraph 3 (e).

8.6 The analysis of the author's communication reveals that he has made two complaints in respect of the issue of delay. His initial complaint that a delay of five years in the execution of the sentence of death constitutes cruel, inhuman and degrading treatment within the meaning of article 7 of the Covenant was declared inadmissible in the Committee's admissibility decision of 20 March 1992. The author's subsequent claim, relating to administrative and judicial delays, was found admissible in respect of article 14, paragraph 3 (c). However, the substance of this claim has remained unclear, and no material in support of it has been placed before the Committee. In the circumstances, the Committee finds no violation of article 14, paragraph 3 (c).

9. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it do not disclose a violation of any of the provisions of the Covenant.

[Adopted in English, French and Spanish, the English text being the original version].

Notes

a/ On 24 March 1993, the Human Rights Committee adopted its views in respect of Mr. Martin's communication, finding no violations of the Covenant (see Official Records of the General Assembly, Forty-eighth Session, Supplement No. 40 (A/48/40), annex XII.J. Although the Judicial Committee of the Privy Council also dismissed Mr. Martin's petition, it expressed concern about the judicial delays encountered in the case.

b/ That is, at the time of submission of the communication (October 1988).

c/ Official Records of the General Assembly, Forty-sixth Session, Supplement No. 40 (A/46/10), annex XI.D, communication No. 253/1987 (Paul Kelly v. Jamaica), views adopted on 8 April 1991, paras. 4.1 and 5.3.

F. Communication No. 333/1988, Lenford Hamilton v. Jamaica (views adopted on 23 March 1994, fiftieth session)

Submitted by: Lenford Hamilton (represented by counsel)

Alleged victim: The author

State party: Jamaica

Date of communication: 7 November 1988 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 23 March 1994,

Having concluded its consideration of communication No. 333/1988, submitted to the Human Rights Committee on behalf of Mr. Lenford Hamilton under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts its views under article 5, paragraph 4, of the Optional Protocol.

1. The author of the communication is Lenford Hamilton, a Jamaican citizen under sentence of death, detained at St. Catherine District Prison, Jamaica. He claims to be a victim of violations by Jamaica of articles 7 and 14 of the International Covenant on Civil and Political Rights. He is represented by counsel.

The facts as submitted by the author

2.1 The author was convicted for the shooting and killing of a policeman, Caswell Christian, on 27 February 1981 in the parish of St. Catherine. The deceased and other police officers were in the process of searching a number of houses in the ghetto area of Tawes Pen when he was shot from behind a curtain in the living room of an apartment that was being searched. It was submitted that at least two police officers had seen the author running away from the block of apartments where the shooting had taken place. The author indicates that he was not arrested until almost 17 months later, on 23 July 1982. He claims that he was not placed on an identification parade and that he was identified by confrontation only.

2.2 The author was tried in the Home Circuit Court, Kingston, from 15 to 17 November 1983. From the trial transcript, it transpires that the police officers who had arrested the author at the Central Police Station had not themselves identified the author at the scene of the crime but merely relied on the reports filed by two other police officers. One of these officers testified during the trial that he had not been able to see the face of the accused for more than a "split second".

2.3 Upon conclusion of the trial, the author was found guilty as charged and sentenced to death. He appealed to the Court of Appeal of Jamaica, which heard and dismissed the appeal on 14 January 1986. The author has since manifested his desire to file a petition for special leave to appeal with the Judicial

Committee of the Privy Council, but has been unable to do so, as the Court of Appeal did not issue a reasoned judgement.

2.4 On 7 November 1988, a warrant for the execution of the author on 15 November 1988 was issued. On 14 November 1988, he was given a stay of execution, pending the outcome of representations to the Judicial Committee of the Privy Council on his behalf.

The complaint

3. The author claims to be a victim of a violation of article 7 of the Covenant, on account of the length of time spent on death row, and of article 14, because of the Court of Appeal's failure to issue a reasoned judgement.

The State party's information and observations

4.1 In submissions dated 3 March and 7 July 1989 and 21 February 1990, the State party argues that the communication is inadmissible on the ground of non-exhaustion of domestic remedies, because the author had not yet applied to the Judicial Committee of the Privy Council for special leave to appeal.

4.2 As to the author's contention that he was prevented from filing a petition for special leave to appeal because of the absence of a reasoned judgement of the Court of Appeal, the State party argues that this statement has no basis in law or practice. It observes in this context that the Judicial Committee (General Appellate Jurisdiction) Rules Order 1982 does not stipulate that a written judgement of the Court of Appeal is a necessary prerequisite for a petition for special leave to appeal and that, in practice, the Judicial Committee has heard several petitions in the absence of a written judgement.

4.3 The State party further submits that the Court of Appeal did not issue a reasoned judgement in the author's case since it was not then the practice of the Court to do so in appeals considered to be unmeritorious.

The Committee's decision on admissibility

5.1 During its forty-fourth session in March 1992, the Committee considered the admissibility of the communication. It noted that the Court of Appeal of Jamaica had still not issued a written judgement in the author's case, although the appeal had been dismissed more than six years earlier. It concluded that in the circumstances, the application of domestic remedies had been unreasonably prolonged within the meaning of article 5, paragraph 2 (b), of the Optional Protocol.

5.2 As to the author's allegation of a violation of article 7 of the Covenant, the Committee considered that the author had failed to substantiate this claim, for purposes of admissibility, and concluded that Mr. Hamilton had no claim within the meaning of article 2 of the Optional Protocol.

5.3 Inasmuch as the author's claims related to the evaluation of the evidence against him by the Home Circuit Court in Kingston, the Committee, by reference to its established jurisprudence, a/ considered that this part of the communication was inadmissible under article 3 of the Optional Protocol.

5.4 Finally, the Committee considered that the Court of Appeal's failure to issue a written judgement could raise issues under article 14, paragraphs 3 (c) and 5, which should be considered on the merits; accordingly, on 20 March 1992, it declared the communication admissible in respect of article 14, paragraphs 3 (c) and 5, of the Covenant.

The State party's request for a review of admissibility and counsel's comments

6.1 In a submission dated 11 February 1993, the State party reiterates that it considers the communication inadmissible on the ground of non-exhaustion of domestic remedies. It observes that Mr. Hamilton's counsel is presently in the process of pursuing two domestic remedies available to his client: firstly, a criminal appeal to the Judicial Committee of the Privy Council and, secondly, an application to the Governor-General under section 29 (1) of the Judicature (Appellate Jurisdiction) Act to have the author's case remitted to the Court of Appeal for a re-hearing. The State party submits that it is "clear that these are domestic remedies available to the author, which must be exhausted before the Committee is competent to examine the case".

6.2 The State party further argues that the author may still seek redress under section 25 of the Constitution for any alleged violation of his constitutional rights; in this context, it is noted that the right in article 14, paragraph 3 (c), of the Covenant is similar to the right protected under section 20, paragraph 1, of the Jamaican Constitution.

7.1 In his comments, counsel complains that the State party has failed to address the merits of the claims under article 14, paragraphs 3 (c) and 5. He observes that the Government of Jamaica has not made available legal aid to Mr. Hamilton to pursue his application to the Governor-General pursuant to section 29 (1) of the Judicature (Appellate Jurisdiction) Act; this remedy is not therefore available to him in practice. Similarly, no legal aid has been made available under section 25 of the Jamaican Constitution and, accordingly, this remedy is not available to Mr. Hamilton in practice either.

7.2 Counsel notes that the Court of Appeal of Jamaica heard Mr. Hamilton's application under section 29 (1) between 29 September and 1 October 1993, when judgement was reserved. To date, no judgement has been given. Counsel contends, however, that the issues that were considered by the Court of Appeal of Jamaica under section 29 (1) were entirely different from those submitted to the Human Rights Committee for consideration.

7.3 Finally, counsel observes that a Notice of Intention to apply for special leave to appeal (*in forma pauperis*) to the Judicial Committee could be filed without necessarily attaching a copy of the reasoned judgement of the Court of Appeal. He adds that in practice, however, the case could never be argued before the Judicial Committee without such reasons being made available to it. In this context, he recalls that an appeal to the Judicial Committee is against the "judgement" of the Court of Appeal.

Review of admissibility and considerations of merits

8.1 The Committee has taken note of the parties' arguments made in respect of admissibility. It takes the opportunity to expand on its admissibility findings.

8.2 Concerning a re-hearing of the author's case under section 29 (1) of the Judicature (Appellate Jurisdiction) Act, the Committee notes that although the author was not assigned legal aid for the purpose, he secured legal representation for it. This is evidenced by the State party's own submission of

11 February 1993 and conceded by counsel, who points to the fact that the Court of Appeal indeed did re-hear the case between 29 September and 1 October 1993. However, as counsel indicates, the issues before the Court of Appeal differ from those before the Committee, as the re-hearing concerned the re-evaluation of evidence in the case, an aspect in respect of which the communication before the Committee was declared inadmissible under article 3 of the Optional Protocol. An application pursuant to section 29 (1) of the Judicature (Appellate Jurisdiction) Act therefore is not a remedy the author is required to exhaust for purposes of the Optional Protocol, in this particular communication.

8.3 Similar considerations apply to the possibility of a petition for special leave to appeal to the Judicial Committee of the Privy Council. On the basis of the information before the Committee, it would appear that the author's case falls into the category of "fleeting glance identification", for which the Judicial Committee established precise rules and guidelines in a judgement of July 1989. b/ However, even if it could be argued that the directions of the Jamaican courts on the "fleeting glance" identification of Mr. Hamilton did not meet the guidelines established by the Judicial Committee, it is not this issue which is before the Human Rights Committee; furthermore, the absence of a reasoned judgement of the Court of Appeal is likely to prevent the author from successfully arguing his petition before the Judicial Committee although the availability of the judgement is not a precondition for lodging an application for special leave to appeal. The Committee is aware that the Judicial Committee has indicated that it can review an appeal even in the absence of a written judgement. But, as the Judicial Committee itself has noted in the recent judgement of Earl Pratt and Ivan Morgan v. Attorney-General, c/ it is in practice "necessary to have the reasons of the Court of Appeal at the hearing of the application for special leave to appeal, as without them it is not usually possible to identify the point of law or serious miscarriage of justice of which the appellant complains". Under the Committee's jurisprudence, a remedy must be effective, as well as formally available. An appeal on the merits would thus necessarily require a written judgement. Accordingly, the Committee finds that it is unnecessary, in order to exhaust local remedies, to petition the Judicial Committee for special leave to appeal in the absence of a reasoned written judgement.

8.4 As to the possibility of filing a constitutional motion pursuant to section 25 of the Jamaican Constitution, it is uncontested that no legal aid is available for the purpose. As the author would have to rely on the provision of legal aid, the Committee considers that in the absence of legal aid, a constitutional motion does not, in the circumstances of the case, constitute an available and effective remedy within the meaning of article 5, paragraph 2 (b), of the Optional Protocol. Accordingly, the Committee has no reason to review its decision of admissibility of 20 March 1992.

9.1 It remains for the Committee to decide whether the failure of the Jamaican Court of Appeal to issue a reasoned written judgement violated the author's rights under article 14, paragraphs 3 (c) and 5. Article 14, paragraph 5, guarantees the right of convicted persons to have the conviction and sentence reviewed by a "higher tribunal according to law". The Committee, having noted that the failure to issue a reasoned written judgement has effectively prevented the availability of a further remedy, also finds that the author's right, under article 14, paragraphs 3 (c) and 5, to be tried without undue delay and to have his sentence reviewed by a higher tribunal according to law, has been violated.

9.2 The Committee is of the opinion that the imposition of a sentence of death upon conclusion of judicial proceedings in which the provisions of the Covenant have not been respected constitutes, if no further appeal against the sentence is available, a violation of article 6 of the Covenant. As the Committee observed in its general comment 6(16), the provision that a sentence of death may only be imposed in accordance with the law and not contrary to the provisions of the Covenant implies that "the procedural guarantees therein prescribed must be observed, including the right to a fair hearing by an independent tribunal, the presumption of innocence, the minimum guarantees for the defence and the right to review by a higher tribunal". d/ In the instant case, since the final sentence of death was passed and an important requirement under article 14 was not met, it must be concluded that the right protected under article 6 of the Covenant was violated.

9.3 The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of article 14, paragraphs 3 (c) and 5, and consequently of article 6 of the Covenant.

10. In capital punishment cases, the obligation of States parties to observe rigorously all the guarantees for a fair trial set out in article 14 of the Covenant admits of no exception. The Committee is of the view that Mr. Lenford Hamilton, victim of a violation of article 14, paragraphs 3 (c) and 5, and consequently of article 6, is entitled, pursuant to article 2, paragraph 3 (a), of the Covenant, to an effective remedy entailing his release; the State party is under an obligation to ensure that similar violations do not occur in the future.

11. The Committee would wish to receive information, within 90 days, on any relevant measures taken by the State party in respect of the Committee's views.

[Adopted in English, French and Spanish, the English text being the original version.]

Notes

a/ See, for example, Official Records of the General Assembly, Forty-sixth Session, Supplement No. 40 (A/46/40), annex XII.E, communication No. 304/1988, (D. S. v. Jamaica) declared inadmissible on 11 April 1991, paragraph 5.2.

b/ Oliver Whylie et al. v. the Attorney-General of Jamaica.

c/ Judicial Committee of the Privy Council, judgement of 2 November 1993, p. 8.

d/ Official Records of the General Assembly, Thirty-seventh Session, Supplement No. 40 (A/37/40), annex V, general comment 6(16), para. 7).

G. Communication No. 352/1989, Dennis Douglas, Errol Gentles and Lorenzo Kerr v. Jamaica (views adopted on 19 October 1993, forty-ninth session)

Submitted by:	Dennis Douglas, Errol Gentles and Lorenzo Kerr (represented by counsel)
Alleged victims:	The authors
State party:	Jamaica
Date of communication:	9 March 1989 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 19 October 1993,

Having concluded its consideration of communication No. 352/1989, submitted to the Human Rights Committee by Messrs. Dennis Douglas, Errol Gentles and Lorenzo Kerr under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the authors of the communication, their counsel and the State party,

Adopts its views under article 5, paragraph 4, of the Optional Protocol.

The facts as submitted by the authors

1. The authors of the communication are Errol Gentles, Lorenzo Kerr and Dennis Douglas, three Jamaican citizens awaiting execution at St. Catherine District Prison, Jamaica. They claim to be victims of violations of their human rights by the Government of Jamaica. They are represented by counsel.

2.1 The authors were charged with the murder, on 30 August 1980 in the Parish of Clarendon, of one Howard Campbell. They were tried in the Clarendon District Court, found guilty as charged and sentenced to death on 10 April 1981. On 14 April 1983, the Jamaican Court of Appeal dismissed their appeal. A petition for special leave to appeal to the Judicial Committee of the Privy Council was dismissed on 6 October 1988.

2.2 According to the authors, Howard Campbell was sitting on a bench by the roadside in the village of Woodside, Clarendon, when a van with armed men passed through the village. These men, together with two motor-cyclists, began to molest and attack the villagers. The prosecution contended that the raiders had acted with intention to kill. In particular, they caught the deceased, beat and stabbed him to death. Furthermore, as the attack occurred during the campaign for a general election, it was suggested that it could have had political overtones.

2.3 The authors denied having taken part in the raid and testified that they had been elsewhere when the crime occurred. In particular, Mr. Gentles' uncle supported his alibi defence, testifying that he had been home with him at the time in question. The authors claim that no identification parade was held following their arrest. In this connection, Lorenzo Kerr and Errol Gentles claimed, in their petition for special leave to appeal to the Privy Council, that identification evidence was central to their case. They alleged that three police constables who testified during the trial were invited by the prosecution to identify them from the dock; this, however, happened seven months after the murder. Thus, the principal ground of appeal was that the judge, in his summing-up to the jury, misdirected the jurors on the issue of identification evidence and permissibility of dock identification, and that he erred in not pointing out the dangers inherent in such methods of identification. Moreover, they argued that the judge, in reviewing the identification evidence, did not remind the jury that, during the preliminary inquiry, one of the constables who testified against them had not stated that he had seen the authors stabbing the deceased.

2.4 The Court of Appeal, when dealing with the issue of identification evidence, rejected the authors' argument and observed: "In our view, the learned trial judge in directing the jury on the dangers inherent in visual identification had in mind R. v. Whylie. The language of the directions is the language of that case." The authors object to this reasoning and contend that the dangers inherent in dock identification are recognized by the courts in most Commonwealth countries.

2.5 For Mr. Dennis Douglas, it is claimed that the judge erred in not putting the issue of manslaughter to the jury. Without an alternative manslaughter verdict to consider, the jury was bound to convict him of murder after rejecting his alibi defence.

2.6 In a further submission from the authors, dated 11 August 1989, it is stated that the authors were victims of a miscarriage of justice, in that the police did not place them on an identification parade. It is further submitted that they did not have an opportunity to consult with their court-appointed lawyers.

The complaint

3. Although the authors do not invoke any of the provisions of the International Covenant on Civil and Political Rights, it appears from their submissions that they claim to be victims of a violation by Jamaica of article 14 of the Covenant.

4.1 Counsel's submission of 10 February 1993 contains several fresh allegations which the Human Rights Committee is precluded from considering, since they were formulated after the Committee, on 15 March 1990, declared the communication admissible in so far as it appeared to raise issues under article 14, paragraphs 3 (b) and (d) and 5, of the Covenant.

4.2 With regard to a violation of article 14, paragraphs 3 (b) and (d), counsel submits that each author was denied adequate legal representation for their trial in that:

(a) All three were represented by the same junior counsel, Mr. J. H., and leading counsel, Mr. N. E. QC;

(b) Junior counsel was also representing the fourth co-defendant in the same trial;

(c) Until the first day of the trial, N. E. and J. H., together with another attorney, were also representing the fifth co-defendant. Only prior to the empanelling of the jury, this co-defendant requested to be solely represented by the other attorney.

4.3 Furthermore, the amount of time allocated to each of the authors for the preparation of the trial is said to have been insufficient for them and their representatives to prepare the defence in any meaningful way. Sufficient time was particularly important as the trial involved the preparation of complex cross-examination on the issue of identification. Moreover, the preparation of the authors' defence is said to have been prejudiced by the State party's failure to provide them or their legal representatives with the prosecution statements at a sufficiently early stage before the trial, or at all.

Thus, with regard to Dennis Douglas' case, it is submitted that he only met with junior counsel on two occasions prior to the trial. During the first meeting in prison, the author was allegedly denied privacy and therefore could not adequately instruct counsel. Leading counsel attended only the second meeting, which took place immediately prior to the preliminary hearing on 16 October 1989, and which lasted 20 minutes. The only other opportunity to give instructions and discuss the case with his legal representatives took place at the court for five minutes each day during the trial, before the hearing started. It is further submitted that Mr. Douglas was first made aware of the prosecution case against him during the preliminary enquiry, some five months after his arrest, and that it is not clear whether he was ever shown or asked to comment on the prosecution statements prior to the trial.

Lorenzo Kerr submits that although counsel promised to try to obtain the prosecution statements, he was never shown or asked to comment on them prior to the trial.

As to Errol Gentles' case, it is submitted that he first met with counsel at the preliminary enquiry, for a brief interview, and that he then first learned of the prosecution case against him. He had no further meetings with either leading or junior counsel prior to the trial. It is further submitted that it is unclear whether he was ever shown or asked to comment on the prosecution statements prior to the trial.

4.4 Counsel concludes that the fact that one leading and one junior counsel (who initially represented five co-defendants) were assigned to represent all three authors prejudiced their case, since their instructions could not be adequately taken prior to and during the trial, nor could their cases be adequately presented.

4.5 As to the preparation of the appeal to the Jamaican Court of Appeal, it is submitted that the authors were not granted any privacy when consulting their legal representatives, and that the consultations were limited to 20 minutes.

4.6 Finally, counsel submits that the State party's failure to make legal aid available to the authors to pursue a constitutional motion under sections 20 and 25 of the Jamaican Constitution amounts to a violation of article 14, paragraph 5, of the Covenant. In this context, reference is made to paragraph 8.4 of the Committee's views in Communication No. 230/1987 (Raphael Henry v. Jamaica) a/, where the Committee found that the words "according to law" in article 14, paragraph 5, mean that if domestic law provides for further instances of appeal, the convicted person must have effective access to each of them.

The State party's admissibility observations and the authors' comments thereon

5.1 In its submission of 20 July 1989, the State party contends that the communication is inadmissible on the ground of non-exhaustion of domestic remedies, as required by article 5, paragraph 2 (b), of the Optional Protocol. Although the authors' petitions for leave to appeal to the Judicial Committee of the Privy Council have been dismissed, the authors could still avail themselves of constitutional remedies.

5.2 In his comments, counsel denies that constitutional remedies remain open to his clients and submits that the authors cannot afford to retain a lawyer for the purposes of a constitutional motion. Furthermore, there is no provision in the Poor Prisoners' Defence Act for legal aid for that particular purpose; the Jamaica Council for Human Rights had made considerable but unsuccessful efforts to retain lawyers on a pro bono basis. Counsel contends that if a constitutional remedy is theoretically available to the authors, in practice this is not the case.

The Committee's decision on admissibility

6.1 During its thirty-eighth session, in March 1990, the Committee considered the admissibility of the communication. It took note of the State party's contention that the communication was inadmissible because of the authors' failure to pursue constitutional remedies. In the circumstances of the case, the Committee considered that recourse to the Constitutional Court under section 25 of the Jamaican Constitution was not a remedy available to the authors within the meaning of article 5, paragraph 2 (b), of the Optional Protocol.

6.2 The Committee further considered that some of the authors' allegations pertained to the issue of the adequacy of the judge's instructions to the jury, in particular to the issue of the treatment of identification evidence and the possibility of a manslaughter verdict. The Committee reiterated that it is, in principle, beyond its competence to review specific instructions to the jury by the judge, unless it can be ascertained that the instructions to the jury were clearly arbitrary or amounted to a denial of justice, or that the judge clearly violated his obligation of impartiality. In the circumstances, the Committee found that the judge's instructions did not suffer from such defects.

6.3 On 15 March 1990, the Committee declared the communication admissible in respect of article 14, paragraphs 3 (b) and (d) and 5, of the Covenant.

The State party's objections to the admissibility decision and counsel's comments thereon

7.1 In a submission of 6 February 1991, the State party requests the Committee to review its decision on admissibility.

7.2 The State party submits that nothing in the Optional Protocol or in customary international law supports the contention that an individual is relieved of the obligation to exhaust domestic remedies on the mere ground that there is no provision for legal aid and that his indigence has prevented him from resorting to an available remedy. It is submitted that the Covenant only imposes a duty to provide legal aid in respect of criminal offences (art. 14, para. 3 (d)). Moreover, international conventions dealing with economic, social and cultural rights do not impose an unqualified obligation on States to implement such rights: article 2 of the International Covenant on Economic, Social and Cultural Rights provides for the progressive realization of economic rights and relates to the "capacity of implementation of States". In the circumstances, the State party argues that it is incorrect to infer from the authors' indigence and the absence of legal aid for constitutional motions that the remedy is necessarily non-existent or unavailable.

8.1 In his submission of 10 February 1993, counsel comments on the State party's request for review of the admissibility decision, pointing out that the authors were arrested in 1980, tried and convicted in 1981, and that the Jamaican Court of Appeal dismissed their appeal in 1983. It is submitted that a further appeal to the Supreme (Constitutional) Court would, in the circumstances of the case, entail an unreasonable prolongation of the application of domestic remedies.

8.2 Counsel further submits that a constitutional motion in the Supreme (Constitutional) Court of Jamaica would fail, in the light of the precedent set by the Judicial Committee's decisions in DPP v. Nasralla b/ and Riley et al. v. Attorney General of Jamaica c/, where it was held that the Jamaican Constitution was intended to prevent the enactment of unjust laws and not merely unjust treatment under the law.

8.3 As to the State party's contention that nothing in the Optional Protocol or in customary international law supports the contention that a person is relieved of the obligation to exhaust local remedies on the ground that there is no provision for legal aid and that his indigence has prevented him from utilizing an available remedy, it is submitted that such requirement must be deemed to exist particularly in countries where indigence and poverty are common, and where those who can afford legal representation are few and far between. To do otherwise would make the provisions relating to the exhaustion of domestic remedies empty and meaningless. It cannot have been the intention of those who drafted the Optional Protocol that a State party can claim non-exhaustion where such is mainly attributable to that State party's failure to provide the author with the financial means to do so. To decide otherwise would make article 2 of the Covenant meaningless. Pursuant to that article, State parties undertake to guarantee the rights in the Covenant "without distinction of any kind, such as ... property ... or another status". To effectively limit the constitutional remedies to those who can afford the legal fees would be incompatible with the wording of the provision and the rights which the Covenant seeks to secure "without distinction of any kind".

Reconsideration of admissibility issues and examination of the merits

9.1 The Committee has taken note of the State party's request to review its decision on admissibility, as well as its criticism of the reasoning leading to the decision of 15 March 1990. It takes the opportunity to explain its admissibility findings.

9.2 The Committee notes that the Supreme Court of Jamaica has, in recent cases, allowed applications for constitutional redress in respect of breaches of fundamental rights, after the criminal appeals in these cases had been dismissed. However, it also notes that, in the instant case as well as in other cases, d/ the State party indicates that legal aid is not provided for constitutional motions, and that it has no obligation under the Covenant to make legal aid available in respect of such motions, as they do not involve the determination of a criminal charge, as required under article 14, paragraph 3 (d), of the Covenant. In the view of the Committee, this supports the finding, made in its decision on admissibility, that a constitutional motion is not an available remedy for an author who has no means of his own to pursue it. In this context, the Committee observes that the authors do not claim that they are absolved from pursuing constitutional remedies because of their indigence; rather it is the State party's unwillingness or inability to provide legal aid for the purpose that renders the remedy one that need not be pursued for purposes of the Optional Protocol. As to the State party's argument that international conventions dealing with economic, social and cultural rights do not impose an unqualified obligation on States to implement such rights, the Committee observes that the question of whether remedies remain available to the author within the meaning of article 5, paragraph 2 (b), of the Optional Protocol is entirely distinct from and has no bearing on the issue of progressive realization of economic, social and cultural rights.

9.3 The Committee further observes that the authors were arrested in 1980, tried and convicted in 1981, and that their appeal was dismissed in 1983. The Committee deems that for purposes of article 5, paragraph 2 (b), of the Optional Protocol, the pursuit of constitutional remedies would, in the circumstances of the case, entail an unreasonable prolongation of the application of domestic remedies. Accordingly, there is no reason to revise the decision on admissibility of 15 March 1990.

10.1 The Committee notes with regret the absence of cooperation from the State party, which has not made any submission on the substance of the matters under consideration. It is implicit in article 4, paragraph 2, of the Optional Protocol, that a State party should make available to the Committee all the information at its disposal; this is so even where the State party objects to the admissibility of the communication and requests the Committee to review its admissibility decision, as requests for a review of admissibility are examined by the Committee in the context of the consideration of the merits of a case, pursuant to rule 93, paragraph 4, of the rules of procedure.

10.2 The Committee also takes the opportunity to express concern about the fact that counsel, in spite of two reminders, submitted his comments on the State party's submission two years after its receipt and only substantiated the claims almost three years after the adoption of the decision on admissibility. Paragraph 8 (d) of the Committee's decision on admissibility in the case provides that: "Any explanations or statements received from the State party shall be communicated ... to the authors and their counsel ... with the request that any comments that they may wish to submit thereon should reach the Human Rights Committee ... within six weeks of the date of the transmittal". While the submission of any comments is left to the discretion of the authors and their counsel, the Committee considers that any author or counsel who wishes to substantiate his/her claims or wishes to comment on a State party's submission, should do so in a timely manner so as to enable the Committee to conclude its examination in an appropriately expeditious way.

11.1 In respect of the authors' claims under article 14, paragraphs 3 (b) and (d), the Committee reiterates that the right of an accused person to have adequate time and facilities for the preparation of his defence is an important element of the guarantee of a fair trial and a corollary of the principle of equality of arms. The determination of what constitutes adequate time depends on an assessment of the particular circumstances of each case. The material before the Committee discloses that neither leading nor junior counsel nor the authors complained to the trial judge that the time or facilities for the preparation of the defence had been inadequate. The Committee notes that if the authors or counsel had felt that they were improperly prepared, it would have been incumbent upon them to request an adjournment of the trial. Moreover, the Committee cannot conclude, on the basis of the available material, that the authors' representatives were unable to represent them adequately, nor that they displayed lack of professional judgement in the conduct of the defence of their clients. The same is true for the appeal. The written judgement of the Court of Appeal reveals that each of the authors was represented before the Court by different counsel, and there is no evidence that their lawyers were unable to prepare the cases properly for the appeal. The Committee therefore finds no violation of article 14, paragraphs 3 (b) and (d).

11.2 It remains for the Committee to decide whether the failure of the State party to make legal aid available to the authors for purposes of a constitutional motion violated their rights under article 14, paragraph 5, of the Covenant. Article 14, paragraph 5, guarantees the right of convicted persons to have the conviction and sentence reviewed "by a higher tribunal according to law". In this context, the authors claim that because of the non-availability of legal aid, they are denied effective access to the Supreme (Constitutional) Court of Jamaica. In its previous jurisprudence, [e] the Committee had examined the question whether article 14, paragraph 5, guarantees the right to a single appeal to a higher tribunal or whether it guarantees the possibility of further appeals when these are provided for by the law of the State concerned. It observed that the Covenant does not require States parties to provide for several instances of appeal. It found, however, that the words "according to law" in article 14, paragraph 5, must be understood to mean that if domestic law provides for further instances of appeal, the convicted person should have effective access to each of them. The Committee observes that in the instant case, the State party provided the authors with the necessary legal prerequisites for an appeal of the criminal conviction and sentence to the Court of Appeal and to the Judicial Committee of the Privy Council. It further observes that Jamaican law also provides for the possibility of recourse to the Constitutional Court, which is not, as such, a part of the criminal appeal process. Thus, the Committee finds that the availability of legal aid for constitutional motions is not required under article 14, paragraph 5, of the Covenant. Accordingly, the Committee concludes that the authors' rights under this provision were not violated.

12. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before the Committee do not disclose any violation of the provisions of the Covenant.

[Done in English, French and Spanish, the English text being the original version.]

Notes

[a] See *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40* (A/47/40), annex IX.B.

[b] [1967] 2 ALL ER 161.

[c] [1982] 3 AL ER 469.

[d] See, for example, *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40* (A/47/40), annex IX.J, communication No. 283/1988 (*Aston Little v. Jamaica*), views adopted on 1 November 1991 at the forty-third session.

e/ Ibid., annex IX.B, communication No. 230/1987 (Raphael Henry v. Jamaica), para. 8.4.

H. Communication No. 353/1988, Lloyd Grant v. Jamaica (views adopted on 31 March 1994, fiftieth session)

Submitted by: Lloyd Grant (represented by counsel)

Victim: The author

State party: Jamaica

Date of communication: 24 November 1988 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 31 March 1994,

Having concluded its consideration of communication No. 353/1988, submitted to the Human Rights Committee by Mr. Lloyd Grant under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, his counsel and the State party,

Adopts its views under article 5, paragraph 4, of the Optional Protocol.

The facts as submitted by the author

1. The author of the communication is Lloyd Grant, a Jamaican citizen awaiting execution at St. Catherine District Prison, Jamaica. An earlier communication submitted by him to the Human Rights Committee was registered as communication No. 285/1988; on 26 July 1988, the Committee declared it inadmissible on the grounds of non-exhaustion of domestic remedies, since the author had not yet petitioned the Judicial Committee of the Privy Council for special leave to appeal. The decision provided for the possibility of review, pursuant to rule 92, paragraph 2, of the Committee's rules of procedure, after exhaustion of domestic remedies. On 21 November 1988, the Judicial Committee dismissed the author's petition for special leave to appeal. The author thereupon resubmitted his case. He claims to be a victim of violations by Jamaica of articles 6, 7, 10 and 14 of the International Covenant on Civil and Political Rights. He is represented by counsel.

2.1 The author and his brother, Vincent Grant, were tried in the Hanover Circuit Court between 4 and 7 November 1986 for the murder, on 2 October 1985, of one T. M. Both were convicted and sentenced to death. On 5 October 1987, the Court of Appeal of Jamaica dismissed the author's appeal, but acquitted his brother. The author's petition for special leave to appeal to the Judicial Committee of the Privy Council was dismissed on 21 November 1988. With this, it is submitted, all available domestic remedies have been exhausted.

2.2 The author was interrogated by the police on 7 October 1985 in connection with the murder of T. M., who had been killed during a robbery at his home in the parish of Hanover, over 150 miles away from the author's home. The author explained that, while he knew the deceased from the time when he lived in Hanover, he had not visited that town since June 1985 and knew nothing about the crime. He was none the less arrested and placed in custody. On 25 October 1985, the author was placed on an identification parade, where he was identified by the deceased's wife, E. M., whom he also knew. He and

Vincent Grant, who was then living in Hanover, were subsequently charged with the murder of T. M.

2.3 The prosecution's case was that the author acted in common design with his brother and a third, unidentified, man. It relied upon identification evidence of E. M. and of one D. S., and upon statements allegedly made by both defendants under caution.

2.4 E. M. testified that, in the afternoon of 1 October 1985, Vincent Grant, whom she had known all her life, entered the shop. Although she spoke to him he remained silent, staring at her house which was opposite the shop. He then left. Subsequently D. S. entered the shop and told her that he had seen Vincent Grant holding a sharp machete and leaning against the gate to her house, watching her banana field, and that two masked men, both carrying machetes, had been in the field. D. S. further told her that, despite the mask, he had recognized Lloyd Grant, who, when asked what they were doing on the M.'s premises, ran away. E. M. further testified that, after having locked the doors and windows of their house, she and her husband retired to bed; a kerosene lamp was left burning in the living room. At approximately 1 a.m., she was awakened by a noise and she went to the living room where she saw two men who immediately assaulted her. At their request, she gave them all the money kept in the house. She was then forced to lie face down on the floor, and one of the men, whom she identified as Lloyd Grant, bent over her, asking her whether she knew him. When she replied in the negative, he stood up and attacked her husband, who had entered the room. A scuffle ensued and her husband fell to the floor. Lloyd Grant, she stated, then proceeded to humiliate and assault her, during which time she had ample opportunity to see his face. E. M. finally testified that before both men left the premises, they exchanged words with a third man, who was apparently waiting for them outside in the yard.

2.5 The post-mortem examination revealed that T. M.'s death was due to haemorrhage and excessive bleeding as a result of his throat being cut, and that his neck had been broken.

2.6 In court, D. S. further testified that, on 2 October 1985, between 2 a.m. and 3 a.m., he was returning home when he saw Vincent and Lloyd Grant and an unidentified third man run away from the locus in quo.

2.7 Statements allegedly made by both defendants to the police on 7 and 11 October 1985 were admitted in evidence by the judge after a challenge on the voir dire. Vincent Grant allegedly told the police that he had been forced by his brother to accompany him and another man to T. M.'s house, but that after both men had entered the premises, he had run away. In his statement, the author identified Vincent Grant as the mastermind behind the robbery and gave details of the burglary and of his entry into T. M.'s house in the company of his brother and a third person. The author further allegedly stated that while he was outside, holding E. M., the third person came out of the house and told him that he had "chopped up" T. M.

2.8 The author put forward an alibi defence. He made an unsworn statement from the dock, claiming that he had been at his home in Kingston with his girlfriend when the crime occurred. He further claimed that he had been forced by the police to sign, on 11 October 1985, a drawn-up statement. Vincent Grant also made an unsworn statement from the dock, stating only that on 2 October 1985, he was at home with his girlfriend, that he went to bed at 5 o'clock and that he knew nothing about the murder.

2.9 With respect to the identification of Vincent Grant (who had not been identified by E. M.), the testimony of D. S. revealed that his sight had been impaired by the darkness. Before the Court of Appeal, Vincent Grant's counsel argued, inter alia, that the trial judge had failed to give the jury adequate warning about the dangers of identification evidence and, in addition, failed to relate such direction as he gave on identification to the evidence presented by D. S. The Court of Appeal agreed with counsel that the trial judge overlooked the fact that the identification evidence offered in respect of the two defendants was materially different and that each case required appropriate and specific treatment. The Court of Appeal subsequently acquitted Vincent Grant.

2.10 Author's counsel before the Court of Appeal admitted that "there was overwhelming evidence against his client, especially in the light of E. M.'s testimony", and that "although he was of the opinion that the trial judge's directions on identification in relation to the author could have been more helpful, he did not believe that any reasonable argument could be mounted in law as to what the trial judge actually said". He further admitted that "the trial judge gave proper directions on common design" and that "overall he could find no arguable ground to urge on behalf of his client". The Court of Appeal agreed with counsel, stating that, in the case of the author, it found no defects in the instructions to the jury by the judge, and that the evidence against him was "overwhelming".

2.11 Throughout his trial and appeal, the author was represented by legal aid lawyers. A London law firm represented him pro bono before the Judicial Committee of the Privy Council.

2.12 The offence for which the author has been convicted was classified, on 18 December 1992, as a capital offence under the Offences against the Person (Amendment) Act 1992. On 6 January 1993, the author applied to the Court of Appeal for review of the classification in his case. The review process under the Act is currently stayed pending the outcome of a constitutional motion in another case, which challenges the constitutionality of the classification procedure established by the Act.

The complaint

3.1 With regard to articles 7 and 10 of the Covenant, the author claims that on 8 October 1985, he was beaten by police, hit on the head with a gun and threatened with death and that another policeman fired his gun to frighten him. On 11 October 1985, he allegedly was again beaten by the police; he claims that he was whipped with an electric cable and administered electric shocks. The author further claims that on death row, visiting facilities are inadequate and that conditions in the prison are unsanitary and extremely overcrowded.

3.2 In respect of the allegation of unfair trial under article 14 of the Covenant, it is submitted that:

(a) The author did not receive legal advice during the preliminary hearing. It was not until one month prior to the trial that he was assigned a legal aid attorney, who did not consult with him, despite an earlier adjournment for that purpose, until the day before the start of the trial and then only for 40 minutes;

(b) The circumstances of the case were not investigated before the trial began. The attorney did not attempt to secure the testimony of the author's girlfriend, P. D., or of her mother. Although instructed by the author to do so, the attorney failed to contact P. D., whose evidence would have provided an alibi for the author;

(c) The attorney did not argue the issue of reliability of the identification by E. M. If E. M. had been asked when she had last seen the author, it would have been revealed that she had not seen him for about 10 years, when he was fourteen or fifteen years old;

(d) The attorney did not go through the prosecution statements with the author;

(e) Counsel for the appeal effectively abandoned the appeal or failed to pursue it properly. This is said to have prejudiced the author's case before the Judicial Committee of the Privy Council, which acknowledged that there might have been points of law for the Court of Appeal to look into;

(f) Counsel for the appeal also declined to call P. D. It is contended that the author's legal representation was inadequate and in violation of article 14, paragraph 3 (d), in respect of the proceedings before both the Circuit Court and the Court of Appeal.

The State party's information and observations

4. By submissions of 8 May 1990 and 18 April 1991, the State party argued that the communication was inadmissible on the grounds of failure to exhaust all available domestic remedies as required by article 5, paragraph 2 (b), of the Optional Protocol, since the author had failed to avail himself of constitutional remedies in the Supreme (Constitutional) Court of Jamaica. The State party further submitted that the communication did not disclose a violation of any of the rights set forth in the Covenant.

The Committee's decision on admissibility

5.1 During its forty-fourth session, the Committee considered the admissibility of the communication. With regard to the author's claims concerning the conditions of detention on death row, the Committee noted that he had not indicated what steps, if any, he had taken to submit his grievances to the competent prison authorities, and what investigations, if any, had been carried out. Accordingly, the Committee found that in this respect domestic remedies had not been exhausted.

5.2 With regard to the allegation of ill-treatment by the police, the Committee noted that this issue was raised before the trial court, and that the State party had not provided specific information in respect of this allegation in spite of the Committee's request that it do so. The Committee observed, taking into account that the author is a poor person depending on assignment of legal aid and that legal aid is not made available for the purpose of constitutional motions, that there were no further remedies available to the author in respect of this claim.

5.3 With regard to the allegations of unfair trial, the Committee noted that the author's claims related primarily to the inadequacy of the preparation of his defence and of his representation before the Jamaican courts. It considered that these claims might raise issues under article 14, paragraphs 3 (b), (d) and (e) of the Covenant, which should be examined on the merits.

5.4 On 20 March 1992, the Committee declared the communication admissible in so far as it appeared to raise issues under articles 7, 10 and 14, paragraphs 3 (b), (d) and (e) of the Covenant.

The State party's request for review of admissibility and counsel's comments

6.1 The State party, in a submission dated 1 October 1992, maintains that the communication is inadmissible because of non-exhaustion of domestic remedies. It explains that the rights under the Covenant which allegedly were violated in the author's case are similar to the rights contained in sections 17 (1) and 20 (6) (c) and (d) of the Jamaican Constitution. Accordingly, having exhausted the criminal appellate process, it would be open to the author, under section 25 of the Constitution, to seek redress for the alleged violations of his constitutional rights before the Supreme (Constitutional) Court of Jamaica.

6.2 With regard to a violation of article 7, the State party submits that the author did not substantiate his claim; no medical evidence was produced in support of the alleged ill-treatment, nor is there any evidence that he made a complaint to the competent local authorities. It further submits that the appropriate remedy for the author for the alleged violations of his rights under articles 7 and 10 of the Covenant would be a civil action for damages for assault.

6.3 With regard to the alleged violations of article 14, paragraphs 3 (b), (d) and (e), the State party refers to an individual opinion appended to the Committee's views in communication No. 253/1987, a/ and submits that the State party's obligation to provide an accused with legal representation cannot extend beyond the duty to act in good faith in assigning counsel to the accused, and that errors of judgement made by court-appointed lawyers cannot be attributed to the State party any more than errors by privately retained lawyers can be. It concludes that the Committee would be applying a double standard if it were to hold court-appointed lawyers accountable to a higher degree of responsibility than their counterparts, and thus hold the State party responsible for their errors of judgement.

7.1 With regard to the State party's request for review of the admissibility decision, London counsel points out that the State party has failed to show that a constitutional motion would be an effective and available remedy for the author. In this context, it is submitted that a constitutional motion is not a remedy available to the author, as he does not have the means to pursue such a course of action and legal aid is not made available for this purpose. Furthermore, the author has been unable to secure legal representation in Jamaica to argue such a motion on a pro bono basis. It is submitted that, for these reasons, a constitutional motion is not an available remedy which the author is required to exhaust for purposes of article 5, paragraph 2 (b) of the Optional Protocol. In addition, the application of such remedy, and the subsequent appellate process, would entail an unreasonable prolongation of the pursuit of remedies.

7.2 As to the alleged ill-treatment in violation of articles 7 and 10 of the Covenant, counsel submits that on 8 October 1985, the author was taken from his cell (at the Central Police Station in Kingston) to an office, where four policemen proceeded to question him without caution or charge. In the course of the interrogation, the four policemen allegedly beat the author to force him to confess to the crime. The following evening, three policemen took him to the Montego Bay Police Station. On the way to Montego Bay, the policemen turned off the highway and took the author to a "lonely road", where they again questioned and beat the author, with his hands cuffed behind his back. One of the police officers hit the author on his left ear with his gun, causing it to bleed, while another police officer fired his gun close to the author's head. On 11 October 1985, two policemen took the author out of his cell to an upstairs room, where the Superintendent was waiting. In the presence of the Superintendent, the two policemen beat the author on his back with electric wire, until it began to bleed. One of the men plugged in pieces of the wire and gave the author two electric shocks to his side.

7.3 As to the inadequacy of the preparation of the author's defence and of his representation before the Jamaican courts, it is submitted that the author was not represented during police interrogation and during the preliminary hearing. In September 1986, he saw the attorney assigned to him for the trial for the first time. She reportedly requested the judge to adjourn the trial, as she needed more time to prepare the defence. The hearing was rescheduled for 3 November 1986. Although upon requesting the adjournment, the attorney promised the author that she would discuss the case with him that evening, she never came to see him. On 3 November 1986, she visited him in the court lock-up. During the interview, which lasted for only 40 minutes, she took the first statement from the author; the attorney did not investigate the circumstances of the case prior to the trial nor did she consider the author's alibi defence. The author affirms that during the course of the trial he again met with his attorney, but that she did not carry out his instructions.

7.4 With regard to the attorney's failure to pursue the evidence of the author's girlfriend, counsel forwards an affidavit, dated 4 December 1989, from P. D. and a questionnaire, dated 22 March 1990; P. D. contends that the author was with her during the whole night of 1 to 2 October 1985, and that her mother and one P. M. could have corroborated this evidence. It further appears from her affidavit that, on one of the days of the court hearing, she was informed by the police that her presence was needed, but that she failed to go because she had no money to travel and the police allegedly told her that it had no car available to transport her to the Circuit Court. According to London counsel, the main reason why witnesses were not traced and called was that the legal aid rates were so inadequate that the attorney was not able to make the necessary inquiries and initiate the necessary steps to prepare the author's defence properly.

7.5 As to the conduct of the trial defence itself, it is submitted that the attorney failed properly to challenge the testimony of E. M. and D. S., in particular with regard to their identification of the author, and that she did not make any interventions when counsel for the prosecution put leading questions to the prosecution witnesses.

7.6 With regard to the preparation of the author's defence on appeal, reference is made to the transcript of an annex to the "Privy Council questionnaire for inmate appealing" where the author claims that: "On one occasion D. C. [counsel assigned to him for the purpose of the appeal] came inside the prison and saw about 10 inmates (including myself) and I spoke with him for approximately 20 minutes. During those 20 minutes he asked me if I had any knowledge of the crime and if I have any witness. I also asked him to get my girlfriend in court and he don't". It is submitted that, since D. C. had not represented him at the trial, it was essential for the author to have adequate time to consult with D. C. prior to the hearing of the appeal, and that the amount of time granted for that purpose was wholly inadequate. The above is said to indicate that the author's rights under article 14, paragraph 3 (d) were not respected, since counsel was not of his own choosing.

7.7 With regard to the claim that D. C. abandoned or failed properly to pursue the appeal, reference is made to the written judgement of the Court of Appeal and to a letter, dated 8 February 1988, from D. C. to the Jamaica Council for Human Rights. In his letter, D. C. states: "I daresay, however, that the judge's instruction on identification was certainly not the best, but the usual safeguards were complied with and on any legal merit I cannot recommend the case for further consideration". According to London counsel, there were several grounds in the case which could have been argued on appeal, such as P. D.'s evidence (had she been called), and the reliability of the identification evidence of E. M. and D. S., especially in light of the fact that the weakness in the latter's identification concerned both defendants. b/

7.8 Further to the above comments, which relate to the claims which were before the Committee when the communication was declared admissible on 20 March 1992, counsel's comments, dated 12 March 1993, contain several new allegations relating to articles 6, 9, paragraphs 1, 2 and 3, 14, paragraphs 1, 2, 3 (c) and 5, and 15 of the Covenant. For the purpose of the present communication, these further claims have been made too late.

Examination of the merits

8.1 The Committee has taken note of the State party's request that it review its admissibility decision. It reiterates that domestic remedies within the meaning of the Optional Protocol must be both available and effective. The Committee considers that, in the absence of legal aid, a constitutional motion does not, in the circumstances of the instant case, constitute an available remedy, within the meaning of article 5, paragraph 2 (b), of the Optional Protocol, which the author should still exhaust. c/ There is therefore no reason to revise the Committee's earlier decision on admissibility.

8.2 The Committee has considered the communication in the light of all the information made available to it by the parties, as required under article 5, paragraph 1, of the Optional Protocol.

8.3 As to the author's allegation of ill-treatment by the police on 8 and 11 October 1985, the Committee notes from the trial transcript that the police officers allegedly responsible were extensively cross-examined on this issue by the author's attorney both during and after the *voir dire* proceedings. In the absence of supporting medical evidence, the Committee is unable to find violations of articles 7 and 10 of the Covenant in the case.

8.4 Concerning the author's claims relating to the preparation of his defence and his legal representation on trial, the Committee recalls that the right of an accused person to have adequate time and facilities for the preparation of his defence is an important element of the guarantee of a fair trial and an important aspect of the principle of equality of arms. The determination of what constitutes adequate time requires an assessment of the circumstances of each case. The Committee notes that the material before it does not disclose whether either the author or his attorney complained to the trial judge that the time or facilities for the preparation of the defence had been inadequate. Nor is there any indication that the author's attorney acted negligently in the conduct of the defence. In this context, the Committee notes that the trial transcript discloses that E. M. and D. S. were thoroughly cross-examined on the issue of identification by the defence. The Committee therefore finds no violations of article 14, paragraphs 3 (b) and (d), in respect of the author's trial.

8.5 The author also contends that he was unable to secure the attendance of witnesses on his behalf, in particular the attendance of his girlfriend, P. D. The Committee notes from the trial transcript that the author's attorney did contact the girlfriend, and, on the second day of the trial, made a request to the judge to have P. D. called to court. The judge then instructed the police to contact this witness, who, as indicated in paragraph 7.4 above, had no means to attend. The Committee is of the opinion that, in the circumstances, and bearing in mind that this is a case involving the death penalty, the judge should have adjourned the trial and issued a subpoena to secure the attendance of P. D. in court. Furthermore, the Committee considers that the police should have made transportation available to her. To the extent that P. D.'s failure to appear in court was attributable to the State party's authorities, the Committee finds that the criminal proceedings against the author were in violation of article 14, paragraphs 1 and 3 (e), of the Covenant.

8.6 The author also claims that the preparation of his defence and his representation before the Court of Appeal were inadequate, and that counsel assigned to him for this purpose was not of his own choosing. The Committee recalls that, while article 14, paragraph 3 (d), does not entitle the accused to choose counsel provided to him free of charge, measures must be taken to ensure that counsel, once assigned, provides effective representation in the interest of justice. This includes consulting with, and informing, the accused if he intends to withdraw an appeal or to argue before the appellate instance that the appeal has no merit. d/ While it is not for the Committee to question counsel's professional judgement that there was no merit in the appeal, it is of the opinion that he should have informed Mr. Grant of his intention not to raise any grounds of appeal, so that Mr. Grant could have considered any other remaining options open to him. In the circumstances, the Committee finds that the author's rights under article 14, paragraph 3 (b) and (d), were violated in respect of his appeal.

8.7 The Committee is of the opinion that the imposition of a sentence of death upon the conclusion of judicial proceedings in which the provisions of the Covenant have not been respected constitutes, if no further appeal against the sentence is available, a violation of article 6 of the Covenant. In the instant case, while a constitutional motion to the Supreme (Constitutional) Court might in theory still be available, it would not be an available remedy within the meaning of article 5, paragraph 2 (b), of the Optional Protocol, for the reasons indicated in paragraph 8.1 above. As the Committee observed in its general comment No. 6 (16), the provision that a sentence of death may be imposed only in accordance with the law and not contrary to the provisions of the Covenant implies that "the procedural guarantees therein prescribed must be observed, including the right to a fair hearing by an independent tribunal, the presumption of innocence, the minimum guarantees for the defence, and the right to review by a higher tribunal". e/ In the present case, it may be concluded that the final sentence of death was passed without the proceedings having met the requirements of article 14, and that, as a result, the right to life protected by article 6 of the Covenant has been violated.

9. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, finds that the facts before it disclose violations of articles 6 and 14, paragraphs 1, 3 (b), (d) and (e) of the Covenant.

10. The Committee is of the view that Mr. Lloyd Grant is entitled to a remedy entailing his release. It requests the State party to provide information,

within 90 days, on any relevant measures taken by the State party in compliance with the Committee's views.

[Adopted in English, French and Spanish, the English text being the original version.]

Notes

a/ Official Records of the General Assembly, Forty-sixth Session, Supplement No. 40 (A/46/40), annex XI.D, communication No. 253/1987 (Paul Kelly v. Jamaica), views adopted on 8 April 1991.

b/ It appears from the transcript of the Privy Council hearing that author's counsel before the Judicial Committee of the Privy Council argued, inter alia, that the trial judge's direction as to the evidence of E. M. was inadequate, as he had not mentioned to the jury whether any sense of fear on her part could have had an effect upon her ability to identify the assailant. Counsel further argued that the defects found by the Court of Appeal in the trial judge's direction as to the evidence of D. S. affected the author's case as much as it did his brother's, and that the jury might have come to a different conclusion in the author's case if they had been adequately directed on the evidence of D. S. Lord Keith of Kinkel replied that: "It may be so and maybe you have a Court of Appeal point on that, but that is not quite the way we approach the matter when considering whether to grant special leave. The jury might have come to a different conclusion if they had been directed about the evidence of D. S. rather more effectively than they were, that may well be, but the fact remains that you have got a very clear and positive identification by E. M.".

c/ See also the Committee's views in communications Nos. 230/1987 (Raphael Henry v. Jamaica) and 283/1988 (Aston Little v. Jamaica), adopted on 1 November 1991; Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40 (A/47/40), annexes IX.B and J, paras. 7.1 et seq.

d/ See Official Records of the General Assembly, Forty-eighth Session, Supplement No. 40 (A/48/40), annex XII.O, communication No. 356/1989 (Trevor Collins v. Jamaica), views adopted on 25 March 1993, para. 8.2.

e/ Ibid., Thirty-seventh Session, Supplement No. 40 (A/37/40), annex V, general comment 6(16), para. 7.

I. Communication No. 355/1989, George Winston Reid v. Jamaica (views adopted on 8 July 1994, fifty-first session)

Submitted by:	George Winston Reid
Victim:	The author
State party:	Jamaica
Date of communication:	23 February 1989 (initial submission)
Date of decision on admissibility:	25 March 1992

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 8 July 1994,

Having concluded its consideration of communication No. 355/1989 submitted to the Human Rights Committee by Mr. George Winston Reid under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts its views under article 5, paragraph 4, of the Optional Protocol.

The facts as submitted by the author

1. The author of the communication is George Winston Reid, a Jamaican citizen currently detained at the General Penitentiary in Kingston, Jamaica. He claims to be a victim of a violation by Jamaica of his human rights.

2.1 The author was arrested for the murder of his girlfriend, who died of stab wounds in the Cornwall Regional Hospital on 9 January 1980. He claims to be innocent and maintains that his girlfriend was stabbed by an unidentified man in the course of a dispute in her house. The author was taken into custody and detained at Montego Bay for three and a half months. His legal aid attorney, Mr. E. Alcott, first met him about 10 minutes before the start of the trial on 22 April 1980. Without giving any details, the author claims that he was poorly defended. On 23 April 1980, he was sentenced to death. On 16 March 1981, he was notified by the Registrar of the Court of Appeal that his appeal had been dismissed on 27 February 1981. No reasoned judgement was issued, and the author's efforts to obtain copies of trial documents in his case failed.

2.2 Since 1981, the author has unsuccessfully sought legal assistance with a view to filing a petition for leave to appeal to the Judicial Committee of the Privy Council. His first representative, Mr. Alcott, emigrated. Mr. Alcott's daughter, also an attorney, declined to take the case because she did not think that there was merit in it. According to the author, the Notes of Evidence would clearly prove her wrong. He submits that he would be unable to pursue an appeal other than *in forma pauperis*, and that no legal aid has been made available to him.

2.3 On 19 September 1990, the author's death sentence was commuted to life imprisonment.

The complaint

3. Although the author does not invoke any article of the International Covenant on Civil and Political Rights, it appears from his submission that he claims to be a victim of a violation by Jamaica of article 14 of the Covenant.

The State party's observations and the author's comments thereon

4.1 By submission of 7 July 1989, the State party argued that the communication was inadmissible on the grounds of failure to exhaust domestic remedies, since the author could still petition the Judicial Committee of the Privy Council for leave to appeal.

4.2 By further submission of 16 January 1992, the State party confirmed that the author's application for leave to appeal had been refused by the Court of Appeal on 27 February 1981, in an oral judgement, which has not been issued in writing.

4.3 The State party explained that "where an application for leave to appeal is heard and an oral judgement is delivered, it is not permissible in law for the presiding judge or any other judge on that panel to give a written judgement in the same case, unless he had promised to do so at the time of the application for leave to appeal. The reason for this is that once the case is heard and determined, the judges are functus officio and cannot afterwards write up a judgement and put it on the files".

5. In his reply to the State party's submission, the author's counsel, who had agreed to represent him pro bono for purposes of a petition for special leave to appeal to the Judicial Committee of the Privy Council, stated that he had been advised by leading counsel that there were no grounds upon which to petition the Privy Council. He therefore argued that the author was without an effective domestic remedy.

The Committee's decision on admissibility

6. At its forty-fourth session, the Committee considered the admissibility of the communication. It noted the State party's contention that the communication was inadmissible because of the author's failure to petition the Judicial Committee of the Privy Council for special leave to appeal. It also noted that it was uncontested that no reasoned judgement of the Court of Appeal had been issued. Considering that the Judicial Committee cannot sustain arguments that are not corroborated by a written judgement of the Court of Appeal and taking into account the advice given by leading counsel, the Committee concluded that a petition to the Judicial Committee did not, in the special circumstances of the case, constitute an available and effective remedy within the meaning of article 5, paragraph 2 (b), of the Optional Protocol.

7. On 25 March 1992, the Committee therefore declared the communication admissible in so far as it might raise issues under article 14, paragraphs 3 and 5, of the Covenant.

Review of admissibility

8. By submission of 26 October 1992, the State party again argued that the communication was inadmissible for failure to exhaust domestic remedies, since the author could still petition the Judicial Committee of the Privy Council.

9. In his comments dated 17 January 1993 on the State party's submission, the author submitted that in the absence of a written judgement by the Court of Appeal, an appeal to the Privy Council only constituted a theoretical remedy and not one that is practically available.

10. The Committee has taken note of the arguments submitted to it by the State party and the author and reiterates that domestic remedies within the meaning of the Optional Protocol must be both available and effective. The Committee notes that, in the absence of a written judgement by the Court of Appeal, the Judicial Committee of the Privy Council routinely dismisses petitions for special leave to appeal. a/ b/ It reiterates that, in the absence of a written judgement by the Court of Appeal, a petition for special leave to appeal to the Judicial Committee of the Privy Council does not, in the circumstances of the instant case, constitute an available remedy within the meaning of article 5, paragraph 2 (b), of the Optional Protocol. There is therefore no reason to revise the Committee's earlier decision on admissibility of 25 March 1992.

Examination of the merits

11.1 As to the merits of the communication, the State party, by submission of 26 October 1992, argues that there has been no violation of article 14, paragraph 5, in the author's case. In this connection, the State party notes that the Court of Appeal reviewed the author's conviction and sentence and that it was open to the author to seek leave to appeal from this judgement to the Privy Council.

11.2 With regard to the author's claim under article 14, paragraph 3, the State party, by further submission of 12 May 1993, argues that it is unable to submit its comments, since the author has not alleged specific violations of the particular provisions under article 14, paragraph 3, and since the Committee, in its admissibility decision, has not identified the specific subparagraphs either. The State party argues that, under the Optional Protocol, an individual is under an obligation to invoke specific provisions of the Covenant, in order to enable the State party to reply properly to the communication. It further argues that a State party cannot be expected to answer to allegations when it is unaware of their contents.

12. At its forty-ninth session, the Committee considered the communication and decided, on 22 October 1993, to request the State party to comment on the author's claim that he only met his legal aid attorney 10 minutes before the start of the trial and to clarify how the right to adequate time and facilities for the preparation of the defence was guaranteed to the author, as provided in article 14, paragraph 3 (b), of the Covenant. In this context, the Committee also inquired when the legal aid attorney was appointed, whether he was present at the preliminary inquiry and whether the relevant depositions were made available to the attorney and, if so, when. The Committee further decided to request the State party to provide information in respect of Mr. Reid's appeal, in particular to clarify whether Mr. Reid was able to appeal his conviction and sentence unconditionally or whether his right to appeal was dependent on the prior granting of leave to appeal.

13.1 In two further letters, dated 21 November 1993 and 25 February 1994, the author explains that he was represented during the preliminary inquiry by a legal aid lawyer, who later did not represent him at the trial. He further submits that this legal aid lawyer was only present on the first day of the preliminary hearings and that he was not represented on the second day, when evidence was given by a medical doctor. He alleges that the doctor did not speak English, but Spanish, that there was no interpretation and that, when it became clear that the investigating magistrate and the witness could not understand each other, the doctor produced a written statement, which had been prepared in advance. By the time of the trial, the doctor had returned to his home country of Cuba, and the written statement was rendered as evidence. The author claims that he has difficulties further substantiating his allegations, since the State party has failed to provide him with a copy of the trial transcript.

13.2 No information or observations have been forwarded by the State party, despite a reminder sent on 3 May 1994. The Committee notes with regret the absence of cooperation from the State party with the Committee's request for further information, and recalls that it is implicit in article 4, paragraph 2, of the Optional Protocol, that a State party should make available to the Committee all the information at its disposal. In the circumstances, due weight must be given to the author's allegations, to the extent that they have been substantiated.

14.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

14.2 As regards the author's claim that he did not have adequate time and facilities for the preparation of his defence, the Committee notes that it is uncontested that the legal aid lawyer who represented the author at the preliminary inquiry was not present at all the hearings and that the author met the legal aid lawyer who was going to represent him at the trial only 10 minutes before its start. In the absence of any evidence that might prove otherwise, the Committee considers that the time and facilities for the preparation of the author's defence were not adequate and that this must have been known to the investigating magistrate and the trial judge. The Committee therefore concludes that the facts of the case reveal a violation of article 14, paragraph 3 (b), of the Covenant.

14.3 Concerning the proceedings before the Court of Appeal, the Committee recalls that article 14, paragraph 5, states that everyone convicted of a crime shall have the right to have his conviction and sentence reviewed by a higher tribunal according to law. The Committee considers that, while the modalities of an appeal may differ among the domestic legal systems of States parties, under article 14, paragraph 5, a State party is under an obligation to review substantially the conviction and sentence. In the instant case, the Committee considers that the conditions of the dismissal of Mr. Reid's application for leave to appeal, without reasons given and in the absence of a written judgement, constitute a violation of the right guaranteed by article 14, paragraph 5, of the Covenant.

14.4 As regards the author's right to petition the Judicial Committee of the Privy Council for leave to appeal, the Committee notes that the Court of Appeal did not produce a written judgement. In these circumstances, the author was prevented from effectively petitioning the Judicial Committee of the Privy Council for special leave to appeal. The Committee recalls that the words "according to law" in article 14, paragraph 5, are to be interpreted to mean that if domestic law provides for further instances of appeal, the convicted person must have effective access to each of them. Moreover, in order to enjoy the effective use of this right, the convicted person is entitled to have, within reasonable time, access to written judgements, duly reasoned, for all instances of appeal. c/ In this connection, the Committee refers to its earlier jurisprudence and reaffirms that article 14, paragraph 3 (c), and article 14, paragraph 5, are to be read together, in the sense that the right to review of conviction and sentence must be made available without undue delay at all instances. d/ The Committee concludes that in the instant case there has been a violation of article 14, paragraphs 3 (c) and 5, of the Covenant in this respect.

15. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of article 14, paragraphs 3 (b), 3 (c) and 5, of the International Covenant on Civil and Political Rights.

16. The Committee is of the view that Mr. Reid is entitled to an appropriate remedy under article 2, paragraph 3, of the Covenant. In this case, as the Committee finds that Mr. Reid did not receive a fair trial within the meaning of the Covenant, the Committee considers that the appropriate remedy entails his release. The State party is under an obligation to ensure that similar violations do not occur in the future.

17. The Committee would wish to receive information, within 90 days, on any relevant measures taken by the State party in respect of the Committee's views.

[Adopted in English, French and Spanish, the English text being the original version.]

Notes

a/ See inter alia Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40 (A/47/40), annex IX.B, communication No. 230/1987 (Raphael Henry v. Jamaica), views adopted on 1 November 1991; and ibid., Forty-sixth Session, Supplement No. 40 (A/46/40), annex XI.D, communication No. 253/1987 (Paul Kelly v. Jamaica), views adopted on 8 April 1991.

b/ Rules 3 and 4 of the Judicial Committee (General Appellate Jurisdiction) Rules Order read:

> "3(1). A petition for special leave to appeal shall:
>
> "(a) State succinctly all such facts as it may be necessary to state in order to enable the Judicial Committee to advise Her Majesty whether such leave ought to be granted;
>
> "(b) Deal with the merits of the case only so far as is necessary to explain the grounds upon which special leave to appeal is sought;
>
> "...
>
> "4. A petitioner for special leave to appeal shall lodge:
>
> "(a) Six copies of the petition and of the judgement from which special leave to appeal is sought;
>
> "..."

c/ See Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40 (A/47/40), annex IX.B, communication No. 230/1987 (Raphael Henry v. Jamaica), views adopted on 1 November 1991, para. 8.4; and ibid., Forty-eighth Session, Supplement No. 40 (A/48/40), annex XII.K, communication No. 320/1988 (Victor Francis v. Jamaica), views adopted on 24 March 1993.

d/ Ibid., Forty-fourth Session, Supplement No. 40 (A/44/40), annex X.F, communications Nos. 210/1986 and 225/1987 (Earl Pratt and Ivan Morgan v. Jamaica), views adopted on 6 April 1989, paras. 13.3-13.5.

J. Communication No. 366/1989, Isidore Kanana v. Zaire (views adopted on 2 November 1993, forty-ninth session)

Submitted by: Isidore Kanana Tshiongo a Minanga

Victim: The author

State party: Zaire

Date of communication: 2 May 1989 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 2 November 1993,

Having concluded its consideration of communication No. 366/1989, submitted to the Human Rights Committee by Mr. Isidore Kanana Tshiongo a Minanga under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts its views under article 5, paragraph 4, of the Optional Protocol.

1. The author of the communication is Isidore Kanana Tshiongo a Minanga, a Zairian citizen residing in Kinshasa, Zaire. The author claims to be a victim of violations of his human rights by Zaire.

The facts as submitted by the author

2.1 The author is a founding member of the Union for Democracy and Social Progress (Union pour la démocracie et le progrès social (UDPS)), a political party which was in opposition to the regime of President Mobutu. a/ At around 1 p.m. on 1 May 1989, members of the Zairian Defence Forces allegedly took him to the headquarters of the Agence Nationale de Documentation (AND), a special branch of the Zairian political police. The author contends that he had been told initially that he was to meet the agency's director but that upon his arrival, he was led to what he refers to as torture chambers. He was left there unattended until around 8 p.m., when several individuals entered the cell. He allegedly was undressed and strapped to the concrete floor of the cell; he was left in this state until around midnight, when five men entered the cell and began torturing him. A sixth man joined them at around 2 a.m. Torture allegedly involved applying electric shocks to the author's genitals as well as heavy beatings, using metal bars with barbed wire wrapped around the end. According to the author, this treatment continued until he lost consciousness, in the early morning hours of 2 May 1989.

2.2 The author was left for dead in bushes along the roadside, in the vicinity of the AND headquarters. He states that he regained consciousness at around 7 a.m. on 2 May and managed to alert some roadworkers, who transported him to the nearby office of the Red Cross, from which he was brought to the American Hospital to undergo emergency treatment; he remained hospitalized for several days.

2.3 The author asserts that as the executive partly controls the judiciary in Zaire, it would be naive to expect to obtain redress through domestic judicial procedures. Nevertheless, the author filed a complaint with the Supreme Court; it appears that to date, no follow-up has been given to it. He further addressed two letters of complaint to the State Commissioner for National Defence and Security, to no avail.

2.4 The author submits that his health remains precarious, and adds that he has suffered from paralysis in the right part of his body since the end of 1990.

The complaint

3. While the author does not invoke any provision of the Covenant, it transpires from his submission that he claims to be a victim of arbitrary detention and of acts of torture. In particular, he notes that he was at no time notified of the reasons for which he had been apprehended.

The Committee's decision on admissibility

4.1 During its forty-fourth session, in March 1992, the Committee considered the admissibility of the communication. It noted with concern that in spite of four reminders addressed to the State party between April 1990 and November 1991, no information or observations on the admissibility of the communication had been received from the State party; nor did the State party provide information, as had been requested by the Special Rapporteur on New Communications, about the status of investigations into the allegations of Mr. Kanana. Given the complete absence of information from the State party about the availability of effective domestic remedies, the Committee concluded that there were no obstacles to the admissibility of the communication.

4.2 On 20 March 1992, therefore, the Committee declared the communication admissible.

Examination of the merits

5.1 The State party did not provide any information in respect of the substance of the author's allegations, in spite of a reminder addressed to it in May 1993. The Committee notes with great concern the total absence of cooperation on the part of the State party, in respect of both the admissibility and the substance of the author's allegations. It is implicit in article 4, paragraph 2, of the Optional Protocol and in rule 91 of the rules of procedure that a State party to the Covenant must investigate in good faith all the allegations of violations of the Covenant against it and its authorities and furnish the Committee with detailed information about the measures, if any, taken to remedy the situation. In the circumstances, due weight must be given to the author's allegations, to the extent that they have been substantiated.

5.2 The Committee notes that the author claims to have been detained at the headquarters of the Agence Nationale de Documentation between the early afternoon of 1 May 1989 and the early morning hours of the following day. He claims that he was not informed of the reasons for his apprehension and detention; this has not been contested. Furthermore, it is uncontested that no warrant was served on him and that he was brought to AND headquarters under false pretexts. These uncontested claims are considered by the Committee to have been substantiated by Mr. Kanana and justify the conclusion that his detention on 1 and 2 May 1989 was arbitrary and contrary to article 9, paragraph 1. The Committee also expresses grave concern about the circumstances of Mr. Kanana's apprehension and the apparent lack of judicial accountability of the Zairian Defence Forces.

5.3 As to the treatment to which the author was subjected between 8 p.m. on 1 May 1989 and the early morning hours of 2 May 1989, it has remained uncontested that Mr. Kanana remained strapped to the concrete floor of his cell for close to four hours, and that he was thereafter subjected to acts of torture for several more hours. The Committee observes in this context that Mr. Kanana has provided photographic evidence of the consequences of this treatment. In the circumstances, the Committee concludes that the author has substantiated his claim that he was subjected to torture and cruel and inhuman treatment, in violation of article 7 of the Covenant, and that he was not treated with respect for the inherent dignity of his person, in violation of article 10, paragraph 1.

6. The Human Rights Committee, acting under article 5, paragraph 4, of the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose violations of articles 7, 9, paragraph 1, and 10, paragraph 1, of the Covenant.

7. The Committee is of the view that Mr. Isidore Kanana is entitled, under article 2, paragraph 3 (a), of the Covenant, to an effective remedy, including appropriate compensation for the treatment suffered. The State party should investigate the events complained of and bring to justice those held responsible for the author's treatment; it further is under an obligation to take effective measures to ensure that occurrences such as those complained of by the author cease and that similar violations do not occur in the future.

8. The Committee would wish to receive information, within 90 days, on any relevant measures taken by the State party in respect of the Committee's views.

[Done in English, French and Spanish, the English text being the original version.]

Notes

a/ In August 1992, the National Sovereign Conference of Zaire designated UDPS leader Etienne Tshisekedi Prime Minister of Zaire; he assumed his duties in late August 1992. His mandate has not been recognized by President Mobutu Sese Seko.

K. Communication No. 375/1989, Glenmore Compass v. Jamaica (views adopted on 19 October 1993, forty-ninth session)

Submitted by:	Glenmore Compass (represented by counsel)
Alleged victim:	The author
State party:	Jamaica
Date of communication:	22 August 1989 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 19 October 1993,

Having concluded its consideration of communication No. 375/1989, submitted to the Human Rights Committee by Mr. Glenmore Compass under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, his counsel and the State party,

Adopts its views under article 5, paragraph 4, of the Optional Protocol.

The facts as submitted by the author

1. The author of the communication is Glenmore Compass, a Jamaican citizen currently awaiting execution at St. Catherine District Prison, Jamaica. He claims to be the victim of a violation by Jamaica of article 14, paragraphs 1 and 3 (e), of the International Covenant on Civil and Political Rights. He is represented by counsel.

2.1 On 4 September 1984, the author was charged, together with one Vernon Pinnock, with the murder, on 25 July 1984, of one Sidney Steele. On 17 January 1986, he was tried in the Home Circuit Court of Kingston, convicted and sentenced to death; his co-defendant was found guilty of manslaughter and sentenced to 15 years of imprisonment.

2.2 The prosecution contended that Mr. Steele and his companion, Ms. Novelette Proverbs, were attacked by Mr. Compass and two other men, Vernon Pinnock and one Barrington Shaw, on their way home on the night of 25 July 1984; during the assault, Mr. Steele was shot. It is further stated that, later that same night, the three men were stopped by two police officers for a routine control; a fight ensued during which the officers arrested Mr. Shaw and recovered a gun which, according to forensic tests, proved to be the murder weapon.

2.3 The author was arrested one month later, after having been recognized by one of the police officers who had been present at the incident of 25 July 1984. He was placed on an identification parade; Ms. Proverbs, the prosecution's main witness, purportedly was unable to identify the author properly, owing to insufficient light in the room. During the trial, however, she made a dock identification of the author, whom she allegedly knew only by sight and by his nickname of "Brown Man"; she also identified the two other assailants and testified that she saw the author shoot the deceased. According to the evidence of a police inspector, the author was duly cautioned upon his arrest and made a statement in which he admitted to being present at the murder scene, but denied knowing that his friends intended to kill Mr. Steele. No written statement was taken from the author.

2.4 The author denies any involvement in the crime. During the trial, he made an unsworn statement from the dock, stating that he was at home with his wife and daughter, watching television, on the night of the murder. He contends that he did not know his co-defendant prior to the trial and that he never made any statement concerning the murder upon his arrest.

2.5 The author further states that the Court of Appeal of Jamaica dismissed his appeal on 10 February 1988. In this context, he indicates that he sought to adduce fresh evidence, which included depositions of two witnesses who had been called to testify at the trial, in order to show inconsistencies in the evidence concerning the identification parade. The Court of Appeal, however, did not admit the evidence. The author further notes that he appealed on the ground that the trial judge erred in his summing-up to the jury in relation to Ms. Proverbs' identification evidence, as well as with respect to the evidence of the arresting officers.

2.6 After the dismissal of his appeal, the author filed a petition for special leave to appeal to the Judicial Committee of the Privy Council on the following grounds: (a) that the Court of Appeal erred in failing to consider whether the dock identifications should have been allowed; (b) that it erred in assuming that the uncertainty of the author's identification by Ms. Proverbs was irrelevant; and (c) that it wrongly evaluated the evidence tendered by another prosecution witness as to why he did not attend the identification parade. On 19 December 1988, the Privy Council dismissed the petition.

2.7 With respect to the requirement of exhaustion of domestic remedies, the author submits that, since the Judicial Committee of the Privy Council dismissed his petition, he has exhausted available domestic remedies within the meaning of article 5, paragraph 2 (b), of the Optional Protocol.

The complaint

3.1 The author claims that he was denied a fair trial and that several irregularities occurred in its course. In particular, he alleges that the trial judge failed to exercise his discretion to prohibit a dock identification by witnesses who had not previously identified the author; that the judge failed to direct the jury on the issue of whether the light at the identification parade was sufficient to allow Ms. Proverbs to identify him; and that the judge failed to warn the jury on the dangers of dock identifications, the significance of the failure by the police to hold another identification parade in better lighting conditions and the danger of relying upon evidence of an alleged confession which was not taken down in writing.

3.2 The author further contends that his rights under article 14, paragraph 3 (e), were violated, since he was not able to cross-examine a prosecution witness, Detective McNab, who at the time of the trial had left the police and emigrated, but whose statements were admitted pursuant to section 34 of the Justices of the Peace Act. The statements are said to have been highly prejudicial to the author's case, in that they purportedly contained identification evidence and evidence that conflicted with the ballistic evidence. In this context, counsel submits that the examination of witnesses in jury trials is fundamental to the notion of fair trial. He contends that the fact that an accused may have had an opportunity to examine a witness against him at a preliminary hearing should not detract from his right to examine that witness before a jury. In this connection, counsel submits that evidence which comes to light after the preliminary hearing, may bring up questions which an accused will wish to put to witnesses against him.

The State party's observations and the author's comments thereon

4.1 The State party contended that, in spite of the dismissal of the author's petition by the Judicial Committee of the Privy Council, the communication was inadmissible for failure to exhaust domestic remedies, since the author had not pursued the remedies available to him under the Jamaican Constitution. In this context, the State party submitted that article 14 of the Covenant invoked by the author is coterminous with the right protected by section 20 of the Jamaican Constitution, which guarantees to everyone the right to due process of law. Under article 25 of the Constitution, if anyone alleges that any of his fundamental rights has been, is being or is likely to be contravened, he may, without prejudice to any other action with respect to the same matter which is lawfully available, apply to the Supreme Court for redress.

4.2 The State party further challenged the Committee's competence to examine the communication, in that the issues raised in the case relate to the evaluation of facts and evidence. In this connection, it referred to the Committee's jurisprudence, which holds that "while article 14 of the Covenant guarantees a right to a fair trial, it is for the appellate courts of States parties to the Covenant to evaluate facts and evidence in a particular case", and that "the review by the Committee of specific instructions to the jury by the judge in a trial by jury is beyond the scope of application of article 14, unless it can be ascertained that the instructions to the jury were clearly arbitrary or amounted to a denial of justice". a/

5. In his comments on the State party's submission, counsel challenged the State party's contention that the author might still pursue constitutional remedies and submitted that these remedies were not available to the author owing to lack of financial means and unavailability of legal aid for the purpose. In this context, reference was made to the Committee's constant jurisprudence under which exhaustion of domestic remedies can only be required to the extent that those remedies are both effective and available within the meaning of article 5, paragraph 2 (b), of the Optional Protocol.

The Committee's consideration of and decision on admissibility

6.1 During its fortieth session, in October 1990, the Committee considered the admissibility of the communication. It observed that recourse to the Constitutional Court under section 25 of the Jamaican Constitution was not a remedy available to the author within the meaning of article 5, paragraph 2 (b), of the Optional Protocol.

6.2 In respect of the author's allegations relating to the issue of the adequacy of the judge's instructions to the jury, the Committee considered that the review by the Committee of specific instructions to the jury in a trial is beyond the scope of application of article 14, unless it can be ascertained that the instructions were clearly arbitrary or amounted to a denial of justice. Since the Committee had no evidence that the judge's instructions suffered from such defects, it found that this part of the communication was inadmissible under article 3 of the Optional Protocol.

6.3 The Human Rights Committee, therefore, on 18 October 1990, declared the communication admissible in so far as it might raise issues under article 14, paragraph 3 (e), of the Covenant, in respect of the claim that the author was unable to cross-examine a prosecution witness whose evidence allegedly was highly prejudicial to his case.

Reconsideration of admissibility issues

7. The State party, by submission of 12 June 1991, maintains that the communication is inadmissible because of the author's failure to seek constitutional redress. It contends that the Committee's reasoning in the admissibility decision reflects a misunderstanding of the relevant Jamaican law; it claims that constitutional redress is still available to the author, since the breach of the right to fair trial was not the subject of judicial determination by the Privy Council. The State party observes that there are judicial precedents which illustrate that recourse to criminal law appellate remedies does not preclude the Supreme (Constitutional) Court's jurisdiction to grant constitutional redress.

8.1 By submission of 9 August 1991, counsel contests that the constitutional motion is a remedy available to the author within the meaning of article 5, paragraph 2 (b), of the Optional Protocol. He argues that the issue of fair trial was actually the subject-matter of the appeal to the Privy Council, and concludes that the Supreme (Constitutional) Court is therefore barred from exercising its powers under section 25 of the Constitution.

8.2 Counsel further argues that, even if the constitutional motion were deemed adequate and effective, it is not a remedy available to the author owing to his lack of financial means and the unavailability of legal aid for the purpose. Counsel emphasizes that the existence of constitutional redress is not denied, but that, in the circumstances of the present case, the provision of legal aid would be necessary to enable an effective pursuit of the constitutional remedy.

9.1 The Committee has taken note of the State party's argument that constitutional remedies are still available to the author. It recalls that the Supreme Court of Jamaica has, in recent cases, allowed applications for constitutional redress in respect of breaches of fundamental rights, after the criminal appeals in these cases had been dismissed.

9.2 However, the Committee also recalls that by submission of 10 October 1991, concerning another case, b/ the State party indicated that legal aid is not provided for constitutional motions, and that it has no obligation under article 14, paragraph 3 (d), of the Covenant to make legal aid available in respect of such motions, as they do not involve the determination of a criminal charge. In the view of the Committee, this supports the finding, made in the decision of admissibility, that a constitutional motion is not an available remedy for an author who has no means of his own to pursue it. In this context, the Committee observes that the author does not claim that he is absolved from pursuing constitutional remedies because of his indigence; rather it is the State party's unwillingness or inability to provide legal aid for the purpose that renders the remedy one that need not be pursued for purposes of the Optional Protocol.

9.3 Accordingly, the Committee considers that there is no reason to revise the decision on admissibility of 19 October 1990.

Examination of the merits

10.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

10.2 The Committee notes with concern that the State party in its submissions has confined itself to issues of admissibility. Article 4, paragraph 2, of the Optional Protocol enjoins a State party to investigate in good faith all the allegations made against it, and to make available to the Committee all the information at its disposal.

10.3 In respect of the author's claim that article 14, paragraph 3, was violated in his case, as he was not given the opportunity to cross-examine one of the main prosecution witnesses, Detective McNab, the Committee notes that it is undisputed that the witness was unable to give evidence during the trial, because he had left Jamaica. The Committee notes, however, that it appears from the trial transcript that the author was present during the preliminary hearing, when McNab gave his statement under oath, and that counsel to the author cross-examined the witness on that occasion. The statement made by the witness, as well as the answers in cross-examination, were put before the Court during the trial as evidence; no objection was taken by the author or his counsel, either at the trial or on appeal, to the introduction of this evidence. The Committee observes that article 14, paragraph 3 (e), protects the equality of arms between the prosecution and the defence in the examination of witnesses, but does not prevent the defence from waiving or not exercising its entitlement to cross-examine a prosecution witness during the trial hearing. In any event, the Committee notes that Detective McNab was examined by the defence under the same conditions as by the prosecution at the preliminary hearing. In the circumstances of the case, the Committee concludes that the facts before it do not disclose a violation of article 14, paragraph 3 (e).

11. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it do not disclose a violation of any of the provisions of the International Covenant on Civil and Political Rights.

[Done in English, French and Spanish, the English text being the original version.]

Notes

a/ See Official Records of the General Assembly, Forty-fifth Session, Supplement No. 40 (A/45/40), annex X.Q, communication No. 329/1988 (D. F. v. Jamaica), decision of 26 March 1990, para. 5.2; and ibid., annex X.S, communication No. 369/1989 (G. S. v. Jamaica), decision of 8 November 1989, para. 3.2.

b/ Ibid., Forty-seventh Session, Supplement No. 40 (A/47/40), annex IX.J, communication No. 283/1988 (Aston Little v. Jamaica), views adopted on 1 November 1991.

L. Communication No. 377/1989, Anthony Currie v. Jamaica (views adopted on 29 March 1994, fiftieth session)

Submitted by: Anthony Currie (represented by counsel)

Alleged victim: The author

State party: Jamaica

Date of communication: 25 October 1989 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 29 March 1994,

Having concluded its consideration of communication No. 377/1989, submitted to the Human Rights Committee by Mr. Anthony Currie under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, his counsel and the State party,

Adopts its views under article 5, paragraph 4, of the Optional Protocol.

The facts as submitted by the author

1. The author of the communication is Anthony Currie, a Jamaican citizen awaiting execution at St. Catherine District Prison, Jamaica. He claims to be the victim of a violation by Jamaica of article 14, paragraphs 1, 3 (c) and 5, *juncto* article 2, paragraph 3, of the International Covenant on Civil and Political Rights. He is represented by counsel.

2.1 The author states that he was charged with the murder, on 18 April 1978, of Ezekiel Segree. Prior to the murder, the author and the deceased had been engaged in an argument. The author alleges that the deceased pulled a knife and injured him. During the trial medical evidence was not called for by the author's lawyer in order to determine whether the author's scar could have been the result of a wound inflicted at the time of the murder; the prosecution witnesses testified that the deceased had not been the aggressor.

2.2 On 8 December 1978, the author was sentenced to death. The author appealed the judgement on the ground that the judge had misdirected the jury on the issue of self-defence. The Jamaican Court of Appeal dismissed his appeal on 11 October 1980. The author subsequently filed a petition for special leave to appeal to the Judicial Committee of the Privy Council. On 20 February 1987, his petition was dismissed in the absence of a written judgement of the Jamaican Court of Appeal. Counsel had invited the Judicial Committee to allow the petition on the basis that the failure of the Court of Appeal to issue a written judgement in a capital case was such a serious violation of the principles of natural justice that leave to appeal should be granted, or to remit the case to Jamaica with a direction under section 10 of the Judicial Committee Act 1844 that the Court of Appeal be required to provide written reasons.

2.3 Section 10 of the 1844 Act (as revised on 31 March 1978) stipulates:

> "It shall be lawful for the said Judicial Committee to make an order or orders on any court in any colony of foreign settlement, or foreign dominion of the crown, requiring the judge or judges of such court to transmit to the clerk of the Privy Council a copy of the notes of evidence in any case tried before such court, and of the reasons given by the judge or judges for the judgement pronounced in any case brought by appeal or by writ of error before the said Judicial Committee."

2.4 The Judicial Committee did not adopt either of the proposed courses and instead dismissed the application for leave to appeal.

The complaint

3.1 The author claims that he has been denied the right to have his conviction and sentence reviewed by a higher tribunal because of the Court of Appeal's failure to issue a written judgement and the subsequent failure of the Judicial Committee to exercise its powers under section 10 of the 1844 Act. He states that he failed to win special leave to appeal to the Judicial Committee because, in the absence of written judgement, he was unable to explain the grounds on which he was seeking leave to appeal and to include copies of the Appeal Court's judgement.

3.2 The author further contends that the failure of the Court of Appeal to issue a written judgement, despite repeated requests on his behalf, violates his right to be tried without undue delay, as in the absence of a written judgement he is unable to pursue effectively his right of appeal to the Judicial Committee of the Privy Council.

3.3 The author further submits that by failing to provide him with an accessible legal procedure for the enforcement of his constitutional rights, the State party denied him the right of access to court to seek redress for the violations of his fundamental rights. The author argues that this failure constitutes a violation of article 14, paragraph 1, juncto article 2, paragraph 3, of the Covenant.

3.4 In support of his allegations the author adduces relevant judicial precedents from the case law of Commonwealth countries, the United States of America, the European Court of Human Rights and the Human Rights Committee. a/

The State party's observations and the author's clarifications

4.1 By submission of 11 January 1990, the State party argues that the communication is inadmissible on the ground of failure to exhaust all domestic remedies.

4.2 The State party submits that the author's right to a fair trial without undue delay and the right to access to court for the determination of criminal charges against him are guaranteed in section 20 (1) of the Jamaican Constitution. Under section 25, any person who alleges that a fundamental right guaranteed in the Constitution has been, is being or is likely to be contravened in relation to him may apply to the Supreme (Constitutional) Court for redress. The State party states that the Supreme Court may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the rights to which the person is entitled.

4.3 The State party argues that, since the author has taken no steps to secure his constitutional remedies, he has therefore not exhausted domestic remedies as required by article 5, paragraph 2 (b), of the Optional Protocol.

5.1 In his comments on the State party's observations, the author explains why, in his opinion, his communication meets the requirements of article 5, paragraph 2 (b), of the Optional Protocol. While conceding that he has not sought to exercise his right under section 25 (1) of the Jamaican Constitution to seek redress for the alleged breach of his constitutional rights before the Supreme Court, he argues that, in practical terms, because of lack of means, this right is not available to him and is therefore not an effective domestic remedy. He submits that he cannot be required to exhaust a remedy that is neither available nor effective.

5.2 The author argues that the State party has rendered his constitutional rights meaningless and nugatory by failing to provide legal aid for constitutional motions. He contends that without the assistance of a lawyer, he is unable to pursue the complex legal procedures that a constitutional motion entails. He states that he has been unsuccessful in finding an attorney willing to represent him on a pro bono basis. He contends that he is therefore being denied effective access to court for the determination of his constitutional rights.

The Committee's decision on admissibility

6. At its forty-fourth session, the Committee considered the admissibility of the communication. It noted the State party's contention that the communication was inadmissible because of the author's failure to pursue the constitutional remedies said to be available to him. In this context, the Committee recalled its constant jurisprudence that domestic remedies within the meaning of the Optional Protocol must be both available and effective; it considered that, in the absence of legal aid for purposes of filing a constitutional motion, the recourse to the Supreme Court under section 25 of the Jamaica Constitution did not constitute a remedy which is both available and effective within the meaning of article 5, paragraph 2 (b), of the Optional Protocol.

7. On 20 March 1992, the Committee therefore declared the communication admissible in so far as it might raise issues under article 14, paragraphs 1, 3 (c) and 5, of the Covenant.

Review of admissibility

8. By submission of 16 February 1993, the State party maintains that the communication is inadmissible for failure to exhaust domestic remedies. It challenges the Committee's finding that a constitutional motion does not provide an adequate and effective remedy in the absence of legal aid. In this context, the State party submits that the Covenant does not require States parties to provide legal aid in all cases, but only, under article 14, paragraph 3 (d), to persons charged with a criminal offence where the interests of justice so require.

9. In his comments, dated 21 June 1993, on the State party's submission, the author refers to his earlier comments concerning the admissibility of the communication.

10. The Committee has taken note of the arguments submitted to it by the State party and the author and reiterates that domestic remedies within the meaning of

the Optional Protocol must be both available and effective. The Committee considers that, in the absence of legal aid, a constitutional motion does not, in the circumstances of the instant case, constitute an available remedy within the meaning of article 5, paragraph 2 (b), of the Optional Protocol. There is therefore no reason to revise the Committee's earlier decision on admissibility of 20 March 1992.

Examination of the merits

11. As to the merits of the communication, the State party argues that the author's allegations do not reveal a violation of the Covenant. With regard to the author's allegation that article 14, paragraph 5, has been violated, the State party submits that the author has had his case reviewed by the Court of Appeal as well as by the Privy Council.

12.1 With regard to his claim under article 14, paragraphs 3 (c) and 5, of the Covenant, that he has been denied the right to have his conviction and sentence reviewed by a higher tribunal without undue delay, the author refers to the Committee's prior jurisprudence, b/ where the Committee found violations of article 14, paragraphs 3 (c) and 5, since the failure of the court to issue a written judgement denied the complainants the possibility of an effective appeal without undue delay. The author points out that it has been 15 years since he was originally charged with murder and nearly 13 years since the Court of Appeal orally dismissed his appeal and that no written judgement has been issued as yet. He challenges the State party's statement that his case had been examined by the Privy Council and states that the Privy Council merely denied him leave to appeal because he was unable to meet the requirements of the Council's rules of procedure, namely, to explain the grounds on which he was seeking special leave to appeal and to include copies of the Appeal Court's judgement with his petition.

12.2 With regard to his claim under article 14, paragraph 1, of the Covenant, that he has been denied the right of access to court to seek constitutional redress for the violation of his human rights, the author submits that the high legal costs involved in seeking constitutional redress are well beyond his means and that no legal aid is provided for constitutional motions. He moreover claims that the complicated nature of the system of constitutional redress makes it inaccessible to him without legal assistance. He argues that although the Covenant does not oblige States parties to provide legal aid in respect of civil actions, States parties are under an obligation to give effect to the rights and remedies set out in the Covenant. The author argues that the absence of legal aid for constitutional motions and the absence of a simple and accessible procedure for constitutional redress deny him effective access to the constitutional court, so that he cannot enjoy his right under article 14, paragraph 1, to a fair and public hearing for the determination of his rights and obligations.

13.1 The Committee has considered the communication in the light of all information made available to it by the parties, as required under article 5, paragraph 1, of the Optional Protocol.

13.2 The author has claimed that the absence of legal aid for the purpose of filing a constitutional motion itself constitutes a violation of the Covenant. The Committee notes that the Covenant does not contain an express obligation as such for a State to provide legal aid for individuals in all cases but only, in accordance with article 14, paragraph 3 (d), in the determination of a criminal charge where the interests of justice so require.

13.3 The Committee is aware that the role of the Constitutional Court is not to determine the criminal charge itself, but to ensure that applicants receive a fair trial in all cases, whether criminal or civil. The State party has an obligation, under article 2, paragraph 3, of the Covenant, to make the remedies in the Constitutional Court addressing violations of fundamental rights available and effective.

13.4 The determination of rights in proceedings in the Constitutional Court must conform with the requirements of a fair hearing in accordance with article 14, paragraph 1. In this particular case, the Constitutional Court would be called on to determine whether the author's conviction in a criminal trial has violated the guarantees of a fair trial. In such cases, the application of the requirement of a fair hearing in the Constitutional Court should be consistent with the principles in paragraph 3 (d) of article 14. It follows that where a convicted person seeking constitutional review of irregularities in a criminal trial has not sufficient means to meet the costs of legal assistance in order to pursue his constitutional remedy and where the interests of justice so require, legal assistance should be provided by the State. In the present case the absence of legal aid has denied to the author the opportunity to test the regularities of his criminal trial in the Constitutional Court in a fair hearing, and is thus a violation of article 14, paragraph 1, juncto article 2, paragraph 3.

13.5 The author also claims that the failure of the Court of Appeal to issue a written judgement violates his right under article 14, paragraph 3 (c), to be tried without undue delay, and his right under article 14, paragraph 5, to have his conviction and sentence reviewed. The State party had not provided any information to show that the Judicial Committee of the Privy Council dismissed the author's petition for special leave to appeal on any grounds other than the absence of a written judgement of the Court of Appeal. In the circumstances, the Committee finds that the author has been barred from making effective use of the remedy of petitioning the Judicial Committee of the Privy Council for special leave to appeal. The Committee recalls that article 14, paragraph 3 (c), and article 14, paragraph 5, are to be read together, so that the right to review of conviction and sentence must be made available without undue delay. c/ In this connection, the Committee refers to its earlier jurisprudence b/ and reaffirms that under article 14, paragraph 5, a convicted person is entitled to have, within reasonable time, access to written judgements, duly reasoned, for all instances of appeal in order to enjoy the effective exercise of the right to have conviction and sentence reviewed by a higher tribunal according to law. The Committee is of the opinion that the failure of the Court of Appeal to issue a written judgement, 13 years after the dismissal of the appeal, constitutes a violation of article 14, paragraphs 3 (c) and 5.

13.6 The Committee is of the opinion that the imposition of a sentence of death upon conclusion of a trial in which the provisions of the Covenant have not been respected constitutes, if no further appeal against the sentence is possible, a violation of article 6 of the Covenant. As the Committee noted in its general comment 6 (16), the provision that a sentence of death may be imposed only in accordance with the law and not contrary to the provisions of the Covenant implies that "the procedural guarantees therein prescribed must be observed, including the right to a fair hearing by an independent tribunal, the presumption of innocence, the minimum guarantees for the defence and the right to review by a higher tribunal." d/ In the present case, since the final sentence of death was passed without due respect for the requirements for a fair trial set out in article 14, paragraphs 3 (c) and 5, there has accordingly also been a violation of article 6 of the Covenant.

14. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of article 14, paragraph 1, *juncto* article 2, paragraph 3, article 14, paragraphs 3 (c) and 5, and consequently article 6 of the International Covenant on Civil and Political Rights.

15. In capital punishment cases, the obligation of States parties to observe rigorously all the guarantees for a fair trial set out in article 14 of the Covenant admits of no exception. The failure to provide Mr. Currie an effective right to appeal without undue delay in accordance with article 14, paragraphs 3 (c) and 5, of the Covenant, means that he did not receive a fair trial within the meaning of the Covenant. Consequently, he is entitled, under article 2, paragraph 3 (a), of the Covenant, to an effective remedy. The Committee is of the view that in the circumstances of the case, this entails his release. The State party is under an obligation to ensure that similar violations do not occur in the future.

16. The Committee would wish to receive information, within ninety days, on any relevant measures taken by the State party in respect of the Committee's views.

[Adopted in English, French and Spanish, the English text being the original version.]

Notes

a/ The author refers, *inter alia*, to the Committee's views in *Earl Pratt and Ivan Morgan v. Jamaica*, communications Nos. 210/1986 and 225/1987, adopted on 6 April 1989 (see *Official Records of the General Assembly, Forty-fourth Session, Supplement No. 40* (A/44/40), annex X.F).

b/ *Official Records of the General Assembly, Forty-eighth Session, Supplement No. 40* (A/48/40), annex XII.K, communication No. 320/1988 (*Victor Francis v. Jamaica*), views adopted on 24 March 1993; ibid., *Forty-seventh Session, Supplement No. 40* (A/47/40), annex IX.J, communication No. 283/1988 (*Aston Little v. Jamaica*), views adopted on 1 November 1991; and ibid., annex IX.B, communication No. 230/1987 (*Raphael Henry v. Jamaica*), views adopted on 1 November 1991.

c/ Ibid., *Forty-fourth Session, Supplement No. 40* (A/44/40), annex X.F, communications Nos. 210/1986 and 225/1987 (*Earl Pratt and Ivan Morgan v. Jamaica*), views adopted on 6 April 1989, paras. 13.3 to 13.5.

d/ Ibid., *Thirty-seventh Session, Supplement No. 40* (A/37/40), annex V, general comment 6 (16), para. 7.

M. Communication No. 407/1990, Dwayne Hylton v. Jamaica (views adopted on 8 July 1994, fifty-first session)

Submitted by:	Dwayne Hylton (represented by counsel)
Victim:	The author
State party:	Jamaica
Date of communication:	24 June 1990
Date of decision on admissibility:	16 October 1992

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 8 July 1994,

Having concluded its consideration of communication No. 407/1990, submitted to the Human Rights Committee by Mr. Dwayne Hylton under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, his counsel and the State party,

Adopts its views under article 5, paragraph 4, of the Optional Protocol.

1. The author of the communication is Dwayne Hylton, a Jamaican citizen awaiting execution at St. Catherine District Prison, Jamaica. He claims to be a victim of violations of his human rights by Jamaica. He is represented by counsel.

The facts as submitted by the author

2.1 On 26 August 1986, the author was taken into custody at the Mandeville police station, Parish of Manchester. On 10 September 1986, he was charged, together with four other men, for the murder, on 7 July 1986, of one C. P. He was tried together with one I. C. and one D. W. in the Manchester Circuit Court in Mandeville. On 26 May 1988, the three men were found guilty as charged, convicted and sentenced to death. The Court of Appeal of Jamaica dismissed the author's appeal on 15 March 1990. When the Committee considered the question of the admissibility of the communication, the author was in the process of petitioning the Judicial Committee of the Privy Council for special leave to appeal; his petition to that body was dismissed on 29 October 1992.

2.2 The author submits that he was unrepresented from the time of his arrest to the time of the preliminary hearing, which took place in October 1986. He indicates that when the hearing started, the examining magistrate asked him if he was represented. After replying in the negative, a lady sitting at the lawyers table told the judge that she had been assigned to represent the author. The author complains that even during the preliminary enquiry, she did not make any effort to communicate with him.

2.3 As to his representation prior to and during the trial, the author contends that it was not until two days before the trial started that he was assigned a lawyer. Counsel allegedly ignored his request to discuss the case prior to the trial; during the trial, the author spoke with him only once, for about 20 minutes. On one occasion, he told counsel that one of the jurors had been seen talking to the investigating officer. Counsel did not react; nor did he call the author's mother to testify, in spite of the author's request to do so.

2.4 On 10 October 1987, an application for a change of venue was filed by the lawyer of I.C., as it was feared that the accused would not obtain a fair trial in Mandeville, the home town of the deceased. The judge, however, refused to change the venue. The author submits that the judge's refusal to grant a change of venue amounted to a miscarriage of justice. According to the author, it was clear that he would not receive a fair trial in Mandeville, because of "widespread publicity and the actual prejudice and hostility generated by persons attending the court and awaiting outside". Moreover, the author claims that the mayor of Mandeville, the uncle of the deceased, used his political influence to have them sentenced. At the end of the trial, one juror allegedly told the author and his co-defendants that most of the jurors had been intimidated by the mayor.

2.5 As to the appeal, the author states that in early March 1990, only two weeks before the hearing, he was notified of the dates of the appeal, and that one Mr. J. H. had been assigned to represent him. He immediately wrote to J. H., explaining that he had never had the opportunity to discuss his case with previous counsel, and that he would like to meet him prior to the hearing; if not, he would assume that counsel could not, or would not, represent him on appeal. The author did not receive a reply to his enquiries and learned that his appeal was dismissed on 15 March 1990. He doubts whether J. H. represented him at all.

2.6 The author further states that on 9 September 1989, warders of St. Catherine District Prison beat one P. L. to death in his cell. Those responsible for his death were not prosecuted. Since the incident, the two co-defendants of P. L. allegedly received death threats from warders. [a]/ On 28 May 1990, after being subjected for two weeks to a special regime of detention (only one or two meals per day, some days without water or the possibility to empty slop pails, as well as incommunicado detention), the ordinary prisoners of the "New Hall" block of the prison forced open their cells and began to protest for food, water and better treatment. The inmates of death row joined the protest at around 10.30 to 11 a.m. The warders were then sent away from the death row section and the army was called in. At the soldiers' request, the death row inmates returned to their cells. The warders then returned and began to search all the cells. The author alleges that during this search, many inmates of the "Gibralta" death row section, including himself, were severely beaten by the warders.

2.7 As a result, three inmates died, among others the author's co-defendant, D. W.; other inmates were seriously injured (injuries reportedly included fractured jaws and skulls). Since the death of D. W., the author and his other co-defendant, I. C., have allegedly repeatedly been threatened with death by warders. The author adds that the warders allegedly told death row inmates that "since the State party was not prepared to hang them" they would devise "other ways of decreasing the death row population".

2.8 On 30 May 1990, the author complained to the Parliamentary Ombudsman about repeated violence in the prison and requested an investigation into the killing of the four inmates, as well as into the continued threats and ill-treatment by the prison warders. By letter of 27 June 1990, the Ombudsman acknowledged the receipt of the complaint, promising that it would receive prompt attention. The author has not received any subsequent reply on the substance of his complaint.

The complaint

3. Although the author does not invoke any of the provisions of the International Covenant on Civil and Political Rights, it appears from his submissions that he claims to be a victim of violations by Jamaica of articles 7, 10 and 14 of the Covenant.

The State party's observations on admissibility and the author's comments thereon

4.1 The State party argued that the communication was inadmissible because of non-exhaustion of domestic remedies. It noted that, with respect to his criminal case, the author could still petition the Judicial Committee of the Privy Council for special leave to appeal, and that legal aid would be available for this purpose under section 3 of the Poor Prisoners' Defence Act.

4.2 As to the author's allegations that he was subjected to ill-treatment, that he received threats to his life and that he was denied a fair hearing, the State party argued that the provisions of the Covenant protecting these rights are co-terminous with the rights protected by sections 17 and 20 of the Jamaican Constitution. Under section 25 of the Constitution, any person who alleges that his fundamental rights have been, are being or are likely to be infringed may apply to the Supreme Court for constitutional redress. A right of appeal lies from the Supreme Court to the Court of Appeal and thereafter to the Judicial Committee of the Privy Council. Since the author failed to take action to pursue his constitutional motion in the Supreme Court, the communication should be declared inadmissible.

5.1 In his comments, the author reiterated that he was still receiving threats from warders. In this context, he stated that he had written twice to the Jamaica Council for Human Rights, but that he had not received a reply.

5.2 In a further letter, the author submitted that since those responsible for the death of the three inmates were about to be tried, he had been subjected to "a massive amount of threats" by other warders, and that he feared for his life.

The Committee's decision on admissibility

6.1 During its forty-sixth session, the Committee considered the admissibility of the communication. With regard to the author's allegations under article 14 of the Covenant, the Committee noted that the author was in the process of petitioning the Judicial Committee of the Privy Council. Accordingly, the Committee found that domestic remedies had not been exhausted in this respect.

6.2 As to the author's claims under articles 7 and 10 of the Covenant, the Committee noted the State party's contention that the communication was inadmissible because of the author's failure to pursue constitutional remedies available to him. In this connection, the Committee considered that, in the absence of legal aid, a constitutional motion did not constitute an available remedy within the meaning of article 5, paragraph 2 (b), of the Optional Protocol, which the author should still exhaust. The Committee further was satisfied that the author had exercised reasonable diligence in seeking redress for the alleged ill-treatment and threats to which he was, and allegedly remained, subjected. It also noted that the State party had failed to inform the Committee as to whether it did investigate the events complained of by the author. Accordingly, the Committee found that, in this respect, the requirements of article 5, paragraph 2 (b), of the Optional Protocol had been met.

6.3 On 16 October 1992, the Committee declared the communication admissible in so far as it might raise issues under articles 7 and 10 of the Covenant.

The State party's objections to the decision on admissibility and the author's further comments thereon

7.1 In a submission dated 15 April 1993, the State party contends that the communication remains inadmissible because the author has failed to seek constitutional redress of the alleged breaches of his rights.

7.2 Concerning the Committee's request to the State party (as set out in the decision on admissibility) to provide information about the result of such investigations as may have taken place into the author's allegations under articles 7 and 10 of the Covenant, the State party affirms that its Ministry of National Security and Justice had started an investigation into the prison disturbances which occurred on 9 September 1989 at St. Catherine District Prison; it further states that the author was interviewed by investigating officers, and that he gave a written statement on 12 February 1992. The State party concludes that it will inform the Committee as soon as a final report is available on the matter. As of May 1994, no further information on the matter had been received.

8.1 The author states, by submission of 10 February 1993, that on 27 January 1993, the offence for which he has been convicted was classified as a capital offence under the Offences against the Person (Amendment) Act 1992. He submits that: "From the moment that I received the notification, ... the warders ... are taunting me with death threats and some of them keep on telling me that they are the ones who will be taking me to the gallows and what size rope will fit my neck and how much weight it will take to take my head off my body". He states that as a result of this psychological torture, he has sustained ulcers.

8.2 The author reiterates that he has exhausted all available domestic remedies; he argues that while he retains a theoretical right to file a constitutional motion, in practice this right remains illusory, given the absence of legal aid for the purpose.

8.3 With regard to the State party's information about the investigation, it is submitted that an investigation into riots, in which several inmates lost their lives and in which many others were seriously wounded, cannot amount to redress for the ill-treatment suffered if it is initiated over two years after the material events and if no final report has been prepared almost five years later. Moreover, the State party has failed to investigate the numerous other occasions on which the author was subjected to ill-treatment and death threats from prison warders.

Examination of the merits

9.1 The Committee has taken note of the State party's argument on admissibility in respect of the availability of constitutional remedies which the author may still pursue. It reiterates that domestic remedies within the meaning of the Optional Protocol must be both available and effective, and that in the absence of effective legal aid made available by the State party for the purpose, a constitutional motion is not a remedy available to Mr. Hylton. There is, therefore, no reason to revise the Committee's decision on admissibility of 16 October 1992.

9.2 With regard to the author's claims under articles 7 and 10 of the Covenant, the Committee notes that the State party has confined itself to indicating that the riots which occurred at St. Catherine District Prison on 9 September 1989 are being investigated, that the author was interviewed by investigating officers and that he gave a statement on 12 February 1992. It has not addressed the author's claims in respect of the events at St. Catherine District Prison that occurred on 28 May 1990, nor has it addressed the author's claims concerning death threats received from prison warders. Article 4, paragraph 2, of the Optional Protocol, however, enjoins the State party to investigate thoroughly, in good faith and within the imparted deadlines, all the allegations of violations of the Covenant made against it, and to make available to the Committee all the information at its disposal.

9.3 The author alleges that he was severely beaten by prison warders during a search of the cells of the death row section at St. Catherine District Prison on 28 May 1990. He claims that since the death of one of his co-defendants, who died as a result of the violence, he has repeatedly been threatened with death by warders, and that the amount of threats increased after those responsible for the death of three inmates were indicted. He further claims that he continues to suffer from psychological torture by the warders, in particular after his case was classified as a capital case in January 1993. These claims have not been refuted by the State party. Furthermore, since the State party has confined itself to the general observation that an investigation was initiated by the Ministry of National Security and Justice into the prison disturbances which occurred at St. Catherine District Prison on 9 September 1989, the Committee remains uninformed whether the threats and ill-treatment to which the author himself allegedly was, and remains, subjected, are also under investigation. In the absence of further information on such investigations, and taking into account that such investigations as have been undertaken do not appear to have been concluded four and a half years after the events, due weight must be given to the author's allegations to the extent that they have been substantiated. Taking into account the detailed description of the events by the author and in view of the lack of information from the State party, the Committee considers that the threats and the ill-treatment to which Mr. Dwayne Hylton has been subjected by the prison warders amount to cruel and inhuman treatment within the meaning of article 7, and also entail a violation of article 10, paragraph 1, of the Covenant.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of articles 7 and 10, paragraph 1, of the Covenant.

11.1 In accordance with the provisions of article 2 of the Covenant, the State party is under an obligation to take effective measures to remedy the violations suffered by Mr. Hylton, including the award of appropriate compensation, and to ensure that similar violations do not occur in the future. In particular, the State party is requested to complete the investigations into the threats and the ill-treatment to which Mr. Hylton has been subjected and to punish those held to be responsible for his treatment.

11.2 The Committee would wish to receive information, within 90 days, on any relevant measures adopted by the State party in respect of the Committee's views.

[Adopted in English, French and Spanish, the English text being the original version.]

Notes

a/ One of P.L.'s co-defendants, N.P., submitted a communication to the Human Rights Committee; communication No. 404/1990, declared inadmissible on 5 April 1993, at the Committee's forty-seventh session (see Official Records of the General Assembly, Forty-eighth Session, Supplement No. 40 (A/48/40), annex XIII.D).

N. Communication No. 412/1990, Auli Kivenmaa v. Finland (views adopted on 31 March 1994, fiftieth session)*

Submitted by:	Auli Kivenmaa (represented by counsel)
Victim:	The author
State party:	Finland
Date of communication:	7 March 1990
Date of decision on admissibility:	20 March 1992

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 31 March 1994,

Having concluded its consideration of communication No. 412/1990, submitted to the Human Rights Committee by Ms. Auli Kivenmaa under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, her counsel and the State party,

Adopts its views under article 5, paragraph 4, of the Optional Protocol.

1. The author of the communication is Ms. Auli Kivenmaa, a Finnish citizen and Secretary-General of the Social Democratic Youth Organization. She claims to be a victim of a violation by Finland of articles 15 and 19, alternatively, article 21, of the International Covenant on Civil and Political Rights. She is represented by counsel.

The facts

2.1 On 3 September 1987, on the occasion of a visit of a foreign head of State and his meeting with the President of Finland, the author and about 25 members of her organization, amid a larger crowd, gathered across from the Presidential Palace, where the leaders were meeting, distributed leaflets and raised a banner critical of the human rights record of the visiting head of State. The police immediately took the banner down and asked who was responsible. The author identified herself and was subsequently charged with violating the Act on Public Meetings by holding a "public meeting" without prior notification.

2.2 The above-mentioned Act on Public Meetings has not been amended since 1921, nor upon entry into force of the Covenant. Section 12 (1) of the Act makes it a punishable offence to call a public meeting without notification to the police at least six hours before the meeting. The requirement of prior notification applies only to public meetings in the open air (sect. 3). A meeting is not public if only those with personal invitations can attend (sect. 1 (2)).

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* The text of an individual opinion submitted by Mr. Kurt Herndl is appended.

Section 1 (1) provides that the purpose of a "meeting" is to discuss public matters and to make decisions on them. Section 10 of the Act extends the requirement of prior notification to public ceremonial processions and marches.

2.3 Although the author argued that she did not organize a public meeting, but only demonstrated her criticism of the alleged human rights violations by the visiting head of State, the City Court, on 27 January 1988, found her guilty of the charge and fined her 438 markkaa. The Court was of the opinion that the group of 25 persons had, through their behaviour, been distinguishable from the crowd and could therefore be regarded as a public meeting. It did not address the author's defence that her conviction would be in violation of the Covenant.

2.4 The Court of Appeal, on 19 September 1989, upheld the City Court's decision, while arguing, inter alia, that the Act on Public Meetings, "in the absence of other legal provisions" was applicable also in the case of demonstrations; that the entry into force of the Covenant had not repealed or amended said Act; that the Covenant allowed restrictions of the freedom of expression and of assembly, provided by law; and that the requirement of prior notification was justified in the case because the "demonstration" was organized against a visiting head of State.

2.5 On 21 February 1990, the Supreme Court denied leave to appeal, without further motivation.

The complaint

3. The author denies that what took place was a public meeting within the meaning of the Act on Public Meetings. Rather, she characterizes the incident as an exercise of her right to freedom of expression, which is regulated in Finland by the Freedom of the Press Act and does not require prior notification. She contends that her conviction was, therefore, in violation of article 19 of the Covenant. She alleges that the way in which the courts found her actions to come within the scope of the Act on Public Meetings constitutes ex analogia reasoning and is, therefore, insufficient to justify the restriction of her right to freedom of expression as being "provided by law" within the meaning of article 19, paragraph 3. Moreover, she contends that such an application of the Act to the circumstances of the events in question amounts to a violation of article 15 of the Covenant (nullum crimen sine lege, nulla poena sine lege), since there is no law making it a crime to hold a political demonstration. The author further argues that, even if the event could be interpreted as an exercise of the freedom of assembly, she still was not under obligation to notify the police, as the demonstration did not take the form of a public meeting, nor a public march, as defined by the said Act.

The State party's observations on admissibility and the author's comments thereon

4.1 By submission of 21 December 1990, the State party concedes that, with regard to the author's complaint against her conviction, all available domestic remedies have been exhausted.

4.2 As to the issue of whether or not the relevant provision of the Act on Public Meetings was applicable in the author's case, the State party submits that it is a question of evidence. The State party points out that the author does not contend that said provision conflicts with the Covenant, only that its specific application in her case violated the Covenant.

5. In her comments on the State party's submission, the author reiterates that not only convictions based on the retroactive application of criminal laws, but also those on analogous application of criminal law, violate article 15 of the Covenant.

The Committee's decision on admissibility

6.1 During its forty-fourth session, the Committee considered the admissibility of the communication. It observed that domestic remedies had been exhausted and that the same matter was not being examined under another procedure of international investigation or settlement.

6.2 On 20 March 1992, the Committee declared the communication admissible in so far as it might raise issues under articles 15, 19 and 21 of the Covenant. In its decision, the Committee requested the State party to clarify whether there was any discrimination between those who cheered and those who protested against the visiting head of State and, in particular, whether any other groups or subgroups in the larger crowd who were welcoming the visiting head of State also distributed leaflets or displayed banners, whether they gave prior notification to the police pursuant to the Act on Public Meetings, and, if not, whether they were similarly prosecuted.

The State party's submission on the merits and the author's comments thereon

7.1 The State party, by submission of 14 December 1992, refers to the questions put to it by the Committee and states that on 3 September 1987, there was only a small crowd of people assembled in front of the Presidential Palace; besides the author's group, there were journalists and some curious passers-by. Except for the author and her friends, no other group or subgroup which could be characterized as demonstrators, distributing leaflets or displaying banners, was present. No other groups had given prior notification to the police of their intent to hold a public meeting.

7.2 The State party recalls that article 19 of the Covenant gives everyone the right to hold opinions without interference and the right to freedom of expression, but that, under paragraph 3 of the provision, the exercise of these rights may be subject to certain restrictions as are provided by law and are necessary for respect of the rights and reputations of others, or for the protection of national security or of public order (ordre public), or of public health and morals. The State party also recalls that the Constitution of Finland protects every citizen's freedom of speech and freedom to publish, and that the exercise of these freedoms is regulated by law, in accordance with the Constitution. The State party submits that, although the wording of the Constitution concentrates on freedom of the press, it has been interpreted broadly so as to encompass freedom of expression as protected by article 19 of the Covenant. In this context, the State party emphasizes that the right to freedom of expression does not depend on the mode of expression or on the contents of the message thus expressed.

7.3 The State party submits that the right to freedom of expression may be restricted by the authorities, as long as these restrictions do not affect the heart of the right. With regard to the present case, the State party argues that the author's freedom of expression has not been restricted. She was allowed freely to express her opinions, for instance by circulating leaflets, and the police did not, after having received information about the organizer of the public meeting, hinder the author and her group from continuing their activities. The State party therefore denies that the Act on Public Meetings was applied ex analogia to restrict the right to freedom of expression.

7.4 In this context, the State party argues that a demonstration necessarily entails the expression of an opinion, but, by its specific character, is to be regarded as an exercise of the right of peaceful assembly. In this connection, the State party argues that article 21 of the Covenant must be seen as lex specialis in relation to article 19 and that therefore the expression of an opinion in the context of a demonstration must be considered under article 21, and not under article 19 of the Covenant.

7.5 The State party agrees with the author that in principle article 15 of the Covenant also prohibits ex analogia application of a law to the disadvantage of a person charged with an offence. It argues, however, that in the present case the author was not convicted of expressing her opinion, but merely of her failure to give prior notification of a demonstration, as is required by article 3 of the Act on Public Meetings.

7.6 With regard to the author's allegation that she is a victim of a violation of article 21 of the Covenant, the State party recalls that article 21 allows restrictions on the exercise of the right to peaceful assembly. In Finland, the Act on Public Meetings guarantees the right to assemble peacefully in public, while ensuring public order and safety and preventing abuse of the right of assembly. Under the Act, public assembly is understood to be the coming together of more than one person for a lawful purpose in a public place that others than those invited also have access to. The State party submits that, in the established interpretation of the Act, the Act also applies to demonstrations arranged as public meetings or street processions. Article 3 of the Act requires prior notification to the police, at least six hours before the beginning of any public meeting at a public place in the open air. The notification must include information on the time and place of the meeting as well as on its organizer. Article 12, paragraph 1, of the Act makes it a punishable offence to call a public meeting without prior notification to the police. The State party emphasizes that the Act does not apply to a peaceful demonstration by only one person.

7.7 The State party explains that the provisions of the Act have been generally interpreted as also applying to public meetings which take the form of demonstrations. In this connection, the State party refers to decisions of the Parliamentary Ombudsman, according to which a prior notification to the police should be made if the demonstration is arranged at a public place in the open air and if other persons than those who have personally been invited are able to participate. The State party submits that the prior notification requirement enables the police to take the necessary measures to make it possible for the meeting to take place, for instance by regulating the flow of traffic, and further to protect the group in their exercise of the right to freedom of assembly. In this context, the State party contends that, when a foreign head of State is involved, it is of utmost practical importance that the police be notified prior to the event.

7.8 The State party argues that the right of public assembly is not restricted by the requirement of a prior notification to the police. In this connection, it refers to jurisprudence of the European Court of Human Rights. The State party emphasizes that the prior notification is necessary to guarantee the peacefulness of the public meeting.

7.9 As regards the specific circumstances of the present case, the State party is of the opinion that the actual behaviour of the author and her friends amounted to a public meeting within the meaning of article 1 of the Act on Public Meetings. In this context, the State party submits that, although the word "demonstration" is not expressly named in the Act on Public Meetings, this does not signify that demonstrations are outside the scope of application of the Act. In this connection, the State party refers to general principles of legal interpretation. Furthermore, it notes that article 21 of the Covenant does not specifically refer to "demonstrations" as a mode of assembly either. Finally, the State party argues that the requirement of prior notification is in conformity with article 21, second sentence. In this context, the State party submits that the requirement is prescribed by law, and that it is necessary in a democratic society in the interests of legitimate purposes, especially in the interest of public order.

8.1 The author, by submission of 28 April 1993, challenges the State party's description of the facts and refers to the Court records in her case. According to these records, witnesses testified that approximately one hundred persons were present on the square, among whom were persons welcoming the foreign head of State and waving miniature flags; no action was taken by the police against them, but the police removed the banner displayed by the author and her friends. According to the author, this indicates that the police interfered with her and her friends' demonstration because of the contents of the opinion expressed, in violation of article 19 of the Covenant.

8.2 The author further challenges the State party's contention that the police did not hinder the author and her group in the expression of their opinion. She emphasizes that the entrance of the foreign head of State into the Presidential Palace was a momentary event, and that the measures by the police (taking away the banner immediately after it was erected and questioning the author) dramatically decreased the possibilities for the author to express her opinion effectively.

8.3 As regards the alleged violation of article 15 of the Covenant, the author refers to her earlier submissions and maintains that applying ex analogia the Act on Public Meetings to a demonstration such as the one organized by the author is in violation of article 15 of the Covenant. In this context, the author submits that the State party's argument that article 21 of the Covenant does not include a reference to demonstrations either is irrelevant, since article 15 only prohibits analogous interpretation to the disadvantage of an accused in criminal procedures.

8.4 The author challenges the State party's contention that it should have been evident to the author that she was under obligation to notify the police of the demonstration. The author argues that this was only firmly established by the Court's decision in her own case, and that the general interpretation to which the State party refers is insufficient as basis for her conviction. The author finally submits that the description of a public meeting, within the meaning of article 1 of the Act, used by the State party is unacceptably broad and would cover almost any outdoor discussion between at least three persons.

8.5 In conclusion, the author states that she does not contest that restrictions on the exercise of the right of peaceful assembly may be justified, and that prior notification of public meetings is a legitimate form of such restrictions. However, the author does challenge the concrete application of the Act on Public Meetings in her case. She contends that this outdated, vague and ambiguous statute was used as the legal basis for police interference with her expressing concern about the human rights situation in the country of the visiting head of State. She claims that this interference was not in conformity with the law nor necessary in a democratic society within the meaning of article 21 of the Covenant. In this connection, it is again stressed that by taking away the banner, the police interfered with the most effective method for the author to express her opinion.

Issues and proceedings before the Committee

9.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

9.2 The Committee finds that a requirement to notify the police of an intended demonstration in a public place six hours before its commencement may be compatible with the permitted limitations laid down in article 21 of the Covenant. In the circumstances of this specific case, it is evident from the information provided by the parties that the gathering of several individuals at the site of the welcoming ceremonies for a foreign head of State on an official visit, publicly announced in advance by the State party authorities, cannot be regarded as a demonstration. In so far as the State party contends that displaying a banner turns their presence into a demonstration, the Committee notes that any restrictions upon the right to assemble must fall within the limitation provisions of article 21. A requirement to pre-notify a demonstration would normally be for reasons of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others. Consequently, the application of Finnish legislation on demonstrations to such a gathering cannot be considered as an application of a restriction permitted by article 21 of the Covenant.

9.3 The right for an individual to express his political opinions, including obviously his opinions on the question of human rights, forms part of the freedom of expression guaranteed by article 19 of the Covenant. In this particular case, the author of the communication exercised this right by raising a banner. It is true that article 19 authorizes the restriction by the law of freedom of expression in certain circumstances. However, in this specific case, the State party has neither referred to a law allowing this freedom to be restricted nor established how the restriction applied to Ms. Kivenmaa was necessary to safeguard the rights and national imperatives set forth in article 19, paragraphs 2 (a) and (b) of the Covenant.

9.4 The Committee notes that while claims under article 15 have been made, no issues under this provision arise in the present case.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of articles 19 and 21 of the Covenant.

11. Pursuant to article 2 of the Covenant, the State party is under an obligation to provide Ms. Auli Kivenmaa with an appropriate remedy and to adopt such measures as may be necessary to ensure that similar violations do not occur in the future.

12. The Committee would wish to receive information, within 90 days, on any relevant measures taken by the State party in respect of the Committee's views.

[Adopted in English, French and Spanish, the original version being in English].

Appendix

Individual opinion (dissenting) submitted by Mr. Kurt Herndl pursuant to rule 94, paragraph 3, of the rules of procedure of the Committee on Human Rights, concerning the Committee's views on communication No. 412/1990 (Auli Kivenmaa v. Finland)

1. While I did (and do) agree with the Committee's decision of 20 March 1992 to declare the present communication admissible inasmuch as the facts reported might raise issues under articles 15, 19 and 21 of the Covenant, I am regrettably unable to go along with the Committee's substantive decision that in the present case Finland has violated articles 19 and 21. The reason for this is that I do not share at all the Committee's legal assessment of the facts.

A. The question of a possible violation of article 21

2.1 The Committee's finding that by applying the 1907 Act on Public Meetings (hereinafter called the 1907 Act) to the author - and ultimately imposing a fine on her in accordance with section 12 of the Act - Finland has breached article 21 of the Covenant, is based on an erroneous appreciation of the facts and, even more so, on an erroneous view of what constitutes a "peaceful assembly" in the sense of article 21.

2.2 In the first sentence of paragraph 9.2 of its views the Committee rightly observes that "a requirement to notify the police of an intended demonstration in a public place six hours before its commencement may be compatible with the permitted limitations laid down in article 21 of the Covenant". A mere requirement, as contained in the 1907 Act, to notify the authorities of a public meeting several hours before it starts, is obviously in line with article 21 of the Covenant which provides for the possibility of legitimate restrictions on the exercise of the right to peaceful assembly "in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others". The 1907 Act certainly falls in this category. This is, by the way, admitted by the author herself, who asserts that she does not contest that restrictions on the exercise of the right to peaceful assembly may be justified and that prior notification of public meetings is a legitimate form of such restrictions (see para. 8.5 of the views). In her last communication she explicitly states that she is not challenging the validity of the 1907 Act *in abstracto* either.

2.3 The legal issue therefore centres on the question of whether the author's actions - the fact that she "and about 25 members of her organization, amid a larger crowd, gathered ..., distributed leaflets and raised a banner" (see para. 2.1 of the views) - ought or ought not to be qualified as a "public meeting" in the sense of the 1907 Act or, for that matter, as a "peaceful assembly" in the sense of article 21 of the Covenant.

2.4 In that respect, the Committee observes in paragraph 9.2 (second sentence) of its views that "it is evident from the information provided by the parties that the gathering of several individuals at the site of the welcoming ceremonies for a foreign head of State on an official visit, publicly announced in advance by the State party authorities, cannot be regarded as a demonstration". I am, much to my regret, not able to follow this reasoning.

2.5 It is not contested by the author that she and a group of people of her organization summoned by her, went to the Presidential Palace explicitly for the purpose of distributing leaflets and raising a banner and thus to publicly denounce the presence, in Finland, of a foreign head of State whose human rights record they criticized. If this does not constitute a demonstration, indeed a public gathering within the scope of article 21 of the Covenant, what else would constitute a "peaceful assembly" in that sense, and, accordingly, a "public meeting" in the sense of the 1907 Act?

2.6 In his commentary on article 21 of the Covenant, Manfred Nowak states the following:

> "The term 'assembly' (réunion) is not defined but rather presumed in the Covenant. Therefore, it must be interpreted in conformity with the customary, generally accepted meaning in national legal systems, taking into account the object and purpose of this traditional human right. It is beyond doubt that not every assembly of individuals requires special protection. Rather, only intentional, temporary gatherings of several persons for a specific purpose are afforded the protection of freedom of assembly." a/

2.7 This is exactly the case with the author's manifestation in front of the Presidential Palace. The decisive element for the determination of an "assembly" - as opposed to a more or less accidental gathering (e.g. people waiting for a bus, listening to a band, etc.) - obviously is the intention and the purpose of the individuals who come together. The author is estopped from arguing that she and her group were bystanders like the other crowd, which was apparently attracted by the appearance of a foreign head of State visiting the President of Finland. She and her group admittedly joined the event to make a political demonstration. This was the sole purpose of their appearing before the Presidential Palace. The State party, therefore, rightly stated, that this was "conceptually" a demonstration.

2.8 Nor can I follow the Committee's argument in paragraph 9.2 (fourth and fifth sentences) where an attempt is made to create a link between the purpose (and thus the legality) of the restrictive legislation as such and its application in a concrete case. To say that "a requirement to pre-notify a demonstration would normally be for reasons of national security", etc., and then to continue "consequently, the application of the Finnish legislation on demonstrations to such a gathering cannot be considered as an application of a restriction permitted by article 21 of the Covenant" is, to say at least, contradictory.

2.9 If the restricting legislation as such - in the present matter the 1907 Act on Public Meetings - is considered as being within the limits of article 21 (a fact not contested by the author and recognized by the Committee) the relevant law must obviously be applied in a uniform manner to all cases falling under its scope. In other words, if the 1907 Act and the obligation therein contained to notify any "public meeting" prior to its commencement, is a valid restriction on the exercise of the right to assembly, permitted under article 21 of the Covenant, then its formal application cannot be considered as a violation of the Covenant, whatever the actual reasons (in the mind of the authorities) for demanding the notification.

2.10 The Finnish authorities, therefore, did not violate article 21 of the Covenant by insisting that the author address an appropriate notification to the authorities prior to her demonstrating in front of the Presidential Palace and by fining her subsequently for not having made such a notification. In objective terms, it would have been easy for the author to comply with the requirement of a simple notification. No reason has ever been induced by her for not doing so, except for her arguing ex post facto that she was not required to notify because her action did not fall under the 1907 Act. She seems to have deliberately chosen to disregard the provisions of the Act, and accordingly had to bear the consequences, i.e. the imposition of a fine.

B. The question of a possible violation of article 19

3.1 In paragraph 9.3 of its views the Committee emphasizes that the author exercised her right to freedom of expression by waiving a banner. As the banner was removed by the police, the Committee concludes that this violated article 19.

3.2 Surely, one will have to place the removal of the banner in the context of the whole event. The author and her group "demonstrate", they distribute leaflets, they waive a banner. The police intervenes in order to establish the identity of the person leading the demonstration (i.e. the "convener" of a public meeting under the 1907 Act). The banner is "taken down" by the police (see para. 2.1 of the views). However, the demonstration is allowed to continue. The author herself and her group go on to distribute their leaflets and presumably give vent in public to their opinion concerning the visiting head of State. There is no further intervention by the police. Hence, the "taking down" of the banner is the only fact to be retained in view of a possible violation of article 19.

3.3 The Committee has opted for a very simple façon de voir: take away the banner and you necessarily violate the right to freedom of expression. This view does not take into account the intimate and somewhat complex relationship between articles 19 and 21 and, for that matter, also article 18 of the Covenant.

3.4 The right of peaceful assembly would seem to be just one facet of the more general right to freedom of expression. In that regard John P. Humphrey in his analysis of political and related rights states as follows: "There would hardly be freedom of assembly in any real sense without freedom of expression; assembly is indeed a form of expression". b/

3.5 If, therefore, there are in force in any given State party, legal norms on the right to assembly which are in conformity with article 21 of the Covenant, including restrictions of that right which are permitted under that article, such legislation will apply to a public meeting or peaceful assembly rather than legislation on the exercise of freedom of expression. In that sense, the observation by the Government of Finland that article 21 must be seen as lex specialis in relation to article 19 (see para. 7.4 of the views) is correct. In that regard, I should like to refer to the relevant portion of the Government's submission which reads as follows: "... this means that article 19 is to be regarded, in any case, as a lex generalis in relation to article 21 (lex specialis), thus excluding the need for separate consideration under the former article". It is regrettable that the Committee, in its views, did not address this legal problem, but contented itself with the somewhat oversimplified statement that just by removing the displayed banner, the Government violated the author's right to freedom of expression. Would the Committee still have found a violation of article 19 if it had found no violation of article 21? Hardly.

C. The question of a possible violation of article 15

4.1 Although the Committee, in its admissibility decision of 20 March 1992, clearly retained article 15 among the articles which might have been violated by the Government of Finland, it completely failed to address the issue of article 15 in its final views. This is all the more surprising as the author in all her submissions, including her last rejoinder, had again and again emphasized that her being fined by the Helsinki City Court (on the basis of section 12 of the 1907 Act) was tantamount to a retroactive application, by analogy, of criminal law. While this argument may be considered on the surface as rather subtle, it is contradicted by the facts of the case.

4.2 The author was convicted not for having expressed her political opinions in a specific way but merely for her undisputed omission "to give the prior notification required by section 3 of the Act on Public Meetings for arranging a certain kind of a public meeting, in her case a demonstration" (as submitted by the State party). Even on the assumption, that applying the 1907 Act with regard to the author's actions was erroneous, which, in turn, might have infringed on the author's rights under article 21 of the Covenant, her conviction on the basis of that same Act surely cannot be qualified as a "retroactive" application of criminal law, forbidden by article 15 (nullum crimen, nulla poena sine lege). Perhaps the Committee thought the argument too far-fetched and unreasonable. In any event, the Committee should have included in its final views a statement to the effect that in the present case Finland has not violated article 15.

[Done in English, French and Spanish, the original version being in English.]

Notes

a/ Manfred Nowak, United Nations Covenant on Civil and Political Rights, CCPR Commentary (Kehl-Strasbourg-Arlington, Engel Publisher, 1993), p. 373.

b/ John P. Humphrey, "Political and Related Rights", in Human Rights in International Law, Legal and Policy Issues, Theodor Meron ed. (Oxford, Clarendon Press, 1984), vol. I, p. 188.

O. Communication No. 414/1990, Primo J. Mika Miha v. Equatorial Guinea (views adopted on 8 July 1994, fifty-first session)

Submitted by: Primo José Essono Mika Miha

Victim: The author

State party: Equatorial Guinea

Date of communication: 28 May 1990 (initial submission)

Date of decision on admissibility: 16 October 1992

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 8 July 1994,

Having concluded its consideration of communication No. 414/1990, submitted to the Human Rights Committee by Mr. Primo José Essono Mika Miha under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts its views under article 5, paragraph 4, of the Optional Protocol.

1. The author of the communication is Primo José Essono Mika Miha, a citizen of Equatorial Guinea born in 1940. He also holds a Spanish passport and currently resides in Madrid. The author claims to be a victim of violations by Equatorial Guinea of articles 3; 6, paragraph 3; 7; 9, paragraphs 1, 2, 4 and 5; 10, paragraph 1; 12, paragraphs 1 and 2; 14, paragraphs 1, 3 (b) and 5; 16; 17, paragraphs 1 and 2; 19, paragraphs 1 and 2; 21; and 22, paragraphs 1 to 3, of the International Covenant on Civil and Political Rights. The Optional Protocol entered into force for Equatorial Guinea on 25 December 1987.

The facts as presented by the author

2.1 The author is a former official of past governments of the Republic of Equatorial Guinea. In 1968, he was elected Deputy of the First Assembly of the Republic; in 1971, he was appointed Permanent Representative of his country to the United Nations. In 1974, he was nominated Ambassador of Equatorial Guinea to Cameroon and the Central African Republic. After the election and the installation of President Macias, the author resigned from his post and left the country, together with his family, for Spain, where he requested political asylum.

2.2 After the death of President Macias, the author returned to his country and took up the post of Director of Administrative, Cultural and Consular Affairs in the new Government's Ministry of Foreign Affairs. In 1982, he once again left the country and sought refuge in Spain, as he feared persecution at the hands of the clan of Mongomo, to which President Obiang Nguema (who had replaced President Macias) belongs.

2.3 On an unspecified date in the summer of 1988, the author returned to Equatorial Guinea, so as actively to support the activities of the opposition party (Partido de Progreso) of which he is a member. At around 11:30 p.m. on

16 August 1988, he was abducted by members of the security forces in a street of Malabo, the country's capital. He claims that he was handcuffed and blind-folded, and that a handkerchief was pushed into his mouth in order to silence him. He was told that President Obiang had ordered his arrest, but no further explanations were given; the author contends that he was arrested solely because of his activities for the Partido de Progreso.

2.4 After his arrest, the author was detained on board a ship and allegedly deprived of food and drink for one week. He was then transferred to the prison of Bata on the mainland, where he allegedly was tortured for two days. The author provides detailed information about the ill-treatment he was subjected to and explains that torture is practised in an open field close to the beach at night, and that not only police officers but also members of the Government attend these sessions. It appears that several other individuals who had been arrested at approximately the same time as the author, and who also belonged to the Partido de Progreso, suffered the same fate as the author. [a]

2.5 The author does not specify the nature of the injuries sustained during torture but claims that he was subsequently kept in detention for well over one month without any medical assistance. He adds that the conditions of detention at the prison of Bata are deplorable, that detainees hardly receive any food unless it is brought to them by relatives, and that they must sleep on the floor.

2.6 On 10 January 1990, while still in detention, the author underwent surgery on his right elbow, made necessary to prevent the development of a serious infection and a tumor, which according to him can be causally linked to the ill-treatment sustained during the summer of 1988. In support of his contention, he submits copies of medical reports, X-rays and the results of medical analyses carried out by a Spanish laboratory. On 1 March 1990, he was released, without any explanations being offered; the authorities did not return to him all the personal belongings (money, plane tickets, jewellery) taken from him after his arrest. He then returned to Spain, where he currently teaches in a public school.

2.7 As to the requirement of exhaustion of domestic remedies, the author submits that such judicial remedies as exist in Equatorial Guinea are totally ineffective. According to the author, the judiciary is directly controlled by President Obiang Nguema himself, who also has his say in the appointment of the judges. As a result, local courts and tribunals are neither independent nor impartial; in this context, the author dismisses the trial against him and a number of co-defendants as summary ("procedimiento sumarísimo"), which did not meet the criteria for a fair hearing. He does not, however, provide further information about the date, venue or circumstances of the trial.

2.8 According to the author, recourse to appellate instances is impossible, as they either do not exist or have fallen into disuse. The author adds that regardless of whether a criminal offence may be tried only after a formal indictment or summarily, trials are conducted summarily, as in his own case. He submits that frequently it is not the tribunal but the President himself who decides on the sentence to be imposed on the accused.

The complaint

3. The author submits that the facts as described above constitute violations of articles 3; 6, paragraph 3; 7; 9, paragraphs 1, 2, 4 and 5; 10, paragraph 1;

12, paragraphs 1 and 2; 14, paragraphs 1, 3 (b) and 5; 16; 17, paragraphs 1 and 2; 19, paragraphs 1 and 2; 21; and 22, paragraphs 1 to 3, of the Covenant.

The State party's observations

4.1 In its submission under rule 91 of the rules of procedure, dated 12 October 1991, the State party challenges the admissibility of the communication, arguing that it violates elemental norms of international law and constitutes an interference into domestic affairs of Equatorial Guinea ("esta comunicación viola las normas elementales del derecho internacional y constituye una ingerencia en los asuntos del Estado ecuatoguineano").

4.2 In this context, the State party explains that the author voluntarily relinquished his Equatorial-Guinean citizenship in 1982 and instead opted for Spanish nationality. As there is neither an agreement nor a treaty between Spain that governs the acquisition of double nationality, and as the author is currently a Spanish civil servant, he is not, in the State party's opinion, subject to its own jurisdiction.

The Committee's decision on admissibility

5.1 During its forty-sixth session, the Committee considered the admissibility of the communication. It dismissed the State party's contention that the author was not subject to its jurisdiction, since the author had been detained in Equatorial Guinea from 16 August 1988 until 1 March 1990 and thus had clearly been subject to the State party's jurisdiction. The Committee recalled that article 1 of the Optional Protocol applies to individuals subject to the jurisdiction of the State concerned who claim to be victims of a violation by that State of their rights under the Covenant, regardless of their nationality. It further noted that the State party's acceptance of the Committee's competence under the Optional Protocol implied that considerations of domestic policy could not be advanced to prevent the Committee from considering claims from individuals subject to the State party's jurisdiction.

5.2 On the issue of exhaustion of domestic remedies, the Committee observed that the State party had not indicated which remedies were available and would be effective in the circumstances of the case. It concluded that the requirements of article 5, paragraph 2 (b), had been met.

5.3 In respect of the author's claims under articles 3; 6, paragraph 3; 16, 17, 21 and 22, the Committee concluded that they had not been substantiated, for purposes of admissibility, and accordingly concluded that the author had no claim within the meaning of article 2 of the Optional Protocol.

5.4 On 16 October 1992, the Committee declared the communication admissible in so far as it appeared to raise issues under articles 7, 9, 10, 12, 14, and 19 of the Covenant.

Examination of the merits

6.1 The State party's deadline for the submission of information and observations under article 4, paragraph 2, of the Optional Protocol expired in June 1993. No submission on the merits has been received from the State party, in spite of a reminder addressed to it on 2 May 1994.

6.2 The Committee notes with regret and concern that the State party has not cooperated with it as far as the provision of information on the substance of the author's claims is concerned. Article 4, paragraph 2, of the Optional Protocol enjoins a State party to investigate thoroughly, in good faith and within the imparted deadlines, all the allegations of violations of the Covenant made against it, and to make available to the Committee in written form all the information at its disposal. This the State party has failed to do. Accordingly, due weight must be given to the author's allegations, to the extent that they have been substantiated.

6.3 The Committee has noted the State party's contention that the communication constitutes an interference into its domestic affairs. The Committee strongly rejects the State party's argument and recalls that when ratifying the Optional Protocol, the State party accepted the Committee's competence to consider complaints from individuals subject to the State party's jurisdiction.

6.4 The author has claimed, and the State party has not refuted, that he was deprived of food and water for several days after his arrest on 16 August 1988, tortured during two days after his transfer to the prison of Bata and left without medical assistance for several weeks thereafter. The author has given a detailed account of the treatment he was subjected to and submitted copies of medical reports that support his conclusion. On the basis of this information, the Committee concludes that he was subjected to torture at the prison of Bata, in violation of article 7; it further observes that the deprivation of food and water after 16 August 1988, as well as the denial of medical attention after the ill-treatment in or outside of the prison of Bata, amounts to cruel and inhuman treatment within the meaning of article 7, as well as to a violation of article 10, paragraph 1.

6.5 As to the author's allegation that he was arbitrarily arrested and detained between 16 August 1988 and 1 March 1990, the Committee notes that the State party has not contested this claim. It further notes that the author was not given any explanation of the reasons for his arrest and detention, except that the President of the Republic had ordered both, that he was not brought promptly before a judge or other officer authorized by law to exercise judicial power, and that he was unable to seek the judicial determination, without delay, of the lawfulness of his detention. On the basis of the information before it, the Committee finds a violation of article 9, paragraphs 1, 2 and 4. On the same basis, the Committee concludes, however, that there has been no violation of article 9, paragraph 5, as it does not appear that the author has in fact claimed compensation for unlawful arrest or detention. Nor is the Committee able to make a finding in respect of article 9, paragraph 3, as it remains unclear whether the author was in fact detained on specific criminal charges within the meaning of this provision.

6.6 The author has claimed a violation of article 12, paragraphs 1 and 2. There is no indication, however, that he was either deprived of his passport or other documents, that the State party restricted his liberty of movement, or that he was denied the right to leave his country. On the basis of the material before the Committee, it appears, rather, that the author left Equatorial Guinea of his own free will, both in 1982 and 1990; nor is there an indication that restrictions were placed on his freedom of movement after his return to Equatorial Guinea in the summer of 1988 and prior to his arrest on 16 August 1988. The Committee thus concludes that there has been no violation of article 12.

6.7 The author has alleged that his trial was summary, and that the judicial system in Equatorial Guinea is neither impartial nor independent. In this context, the Committee has in particular noted the author's contention that the

State party's President directly controls the judiciary in Equatorial Guinea. However, the information provided by the author has not been sufficient to substantiate his claim under article 14. The Committee therefore concludes that there has been no violation of article 14, paragraph 1.

6.8 In respect of issues under article 19, finally, the Committee notes that the State party has not refuted the author's claim that he was arrested and detained solely or primarily because of his membership in, and activities for, a political party in opposition to the regime of President Obiang Nguema. In the circumstances of the case, the Committee concludes that the State party has unlawfully interfered with the exercise of the author's rights under article 19, paragraphs 1 and 2.

7. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the material before it discloses violations of articles 7; 9, paragraphs 1, 2 and 4; 10, paragraph 1; and 19, paragraphs 1 and 2, of the Covenant.

8. Under article 2 of the Covenant, the State party is under an obligation to provide Mr. Mika Miha with an appropriate remedy, including appropriate compensation for the treatment to which he has been subjected.

9. The Committee would wish to receive information, within 90 days, on any measures taken by the State party in respect of the Committee's views.

[Adopted in English, French and Spanish, the English text being the original version]

Notes

a/ The author provides a list with the names of these individuals.

P. Communication No. 417/1990, Manuel Balaguer Santacana v. Spain (views adopted on 15 July 1994, fifty-first session)*

Submitted by: Manuel Balaguer Santacana

Alleged victims: The author and his daughter, María del Carmen Balaguer Montalvo

State party: Spain

Date of communication: 9 July 1990 (initial submission)

Date of decision on admissibility: 25 March 1992

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 15 July 1994,

Having concluded its consideration of communication No. 417/1990, submitted to the Human Rights Committee by Mr. Manuel Balaguer Santacana on behalf of himself and his daughter, María del Carmen Balaguer Montalvo under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts its views under article 5, paragraph 4, of the Optional Protocol.

1. The author of the communication is Manuel Balaguer Santacana, a Spanish citizen born in 1940 and residing in Barcelona, Spain. He submits the communication on his behalf and on behalf of his daughter, María del Carmen Balaguer Montalvo, born in 1985, claiming that they are victims of violations by Spain of articles 23, paragraphs 1 and 4, and 24, paragraph 1, of the International Covenant on Civil and Political Rights. The Optional Protocol entered into force for Spain on 25 April 1985.

The facts as submitted by the author

2.1 The author states that in November 1983 he and María del Carmen Montalvo Quiñones decided to live together. On 15 October 1985, Ms. Montalvo gave birth to a girl, who was recognized by both parents and registered on the Registro Civil of Barcelona under the name of María del Carmen Balaguer Montalvo. The author further states that after the birth of the child, their relationship deteriorated irremediably; on 7 October 1986, Ms. Montalvo left the common household, taking the child with her. After several weeks, the author learned that she had moved to Badalona, a town near Barcelona.

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* The text of an individual opinion submitted by Mrs. Elizabeth Evatt is appended.

2.2 On 10 November 1986, the author filed with the Third Chamber of the Badalona Court (Juzgado Tres de Instrucción y Primera Instancia de Badalona) case No. 18/86 under the regime of "voluntary jurisdiction" (jurisdicción voluntaria), with a view to obtaining the recognition of his paternal authority (patria potestad) and visiting rights to his child. On 28 January 1987, the judge decided that provisional measures should be taken until a final decision was issued in the matter. The author was authorized to spend every Saturday or Sunday from 11 a.m. to 8 p.m. with his daughter, who by then was one year old. In February 1987 he saw his daughter, believed her to be in ill-health and took her to a doctor, keeping her for four days. Subsequent to this visit, the mother refused to let him see the child for a period of 19 months until November 1988.

2.3 On 23 June 1988, the Badalona Court issued an enforcement order (auto de obligado cumplimiento) against Ms. Montalvo, which she appealed to the Superior Court of Barcelona (Tribunal Superior) while continuing to deny the author access to his daughter. One year later, on 23 June 1989, the Superior Court affirmed the order of 23 June 1988.

2.4 On 19 July 1989, the mother started a contentious action (demanda de menor cuantía) before the Badalona Court (case No. 406/89) aimed at modifying the provisional decisions of 28 January 1987 and 23 June 1988. On 16 March 1990, the Court decided to suspend the proceedings of voluntary jurisdiction pending decision on the contentious matter. The author appealed against this decision on 22 March 1990. Nearly two years later, on 31 January 1992, the Superior Court (Tribunal Superior) rejected the author's appeal.

2.5 The author also applied to the Dirección General de atención a la infancia de la Conselleria de Benestar Social de la Generalitat de Catalunya, requesting that his daughter's case be further investigated and protective measures adopted. The department seized of the matter carried out a summary investigation and accepted to consider it in more detail. In April 1990, however, the same department informed the author that it had received an explicit order from the court of first instance to refrain from further examining the case, since the court considered that it alone was competent.

2.6 The author emphasizes the urgency of the matter, since these are his daughter's formative years. He claims that irreparable harm is being done to her by depriving her of the opportunity of having contact with her father. In this connection, he refers to pertinent psychological and sociological studies that conclude that the separation of a child from any one parent may have serious psychological consequences. He finally invokes the Convention on the Rights of the Child, in particular article 9, paragraph 3, which provides:

> "States parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests".

The complaint

3. The author claims that he is a victim of a violation of article 23, paragraphs 1 and 4, of the Covenant, because he has been denied family rights and equality of treatment by the Spanish courts in the award of child custody and because of the failure of the courts to act promptly in enforcing a regime of reasonable parental visits. He also claims a violation of his daughter's

rights under article 24, paragraph 1, of the Covenant, since a child should be afforded access to both parents, especially during her formative years, except in very specific circumstances. He further claims that Spanish legislation does not sufficiently guarantee the right of access and that the practice of Spanish courts, as illustrated by his own and many other cases, reveals a bias in favour of mothers and against fathers. Although he does not specifically invoke article 26 of the Covenant, the author's allegations also pertain to this provision.

The State party's observations and the author's comments thereon

4.1 The State party, in submissions dated 14 January, 15 February, 10 April and 10 September 1991 and 20 and 26 February 1992, objects to the admissibility of the communication as an abuse of the right of submission under article 3 of the Optional Protocol and further argues that the author has failed to exhaust domestic remedies, as required by article 5, paragraph 2 (b), of the Optional Protocol.

4.2 The State party summarizes recent developments in the pending proceedings as follows:

A. Proceedings under "non-contentious jurisdiction"

1. Order of 16 March 1990 of the Badalona Court which suspended the proceedings under non-contentious jurisdiction.

2. Mr. Balaguer, having been notified of this order, filed an application for reconsideration (recurso de reposición) of the order, which was dismissed on 30 April 1990.

3. On 25 June 1990, Mr. Balaguer submitted a further request for review, with a subsidiary appeal (recurso de reforma y subsidiario de apelación).

4. Procedural order of 25 June 1990, declaring the request for review inadmissible subsequent to the application for reconsideration having been lodged and a decision given, and ordering the application for leave to appeal (recurso de apelación) to be processed.

5. Procedural order by the judge, dated 18 December 1990, ordering the parties to be summoned to appear before the Superior Court.

6. Receipt of the orders made under non-contentious jurisdiction by Section Fifteen of the Superior Court of Barcelona, to which the appeal lodged by Mr. Balaguer was transmitted.

7. Procedural order, dated 31 January 1991, by Section Fifteen of the Superior Court, by which the Barcelona Bar was requested to appoint a court lawyer for Mr. Balaguer.

8. Procedural order, dated 23 May 1991, relating to the appointment of the representative for Mr. Balaguer.

9. Procedural order, dated 21 June 1991, authorizing the file to be made available to Mr. Balaguer's lawyer.

10. On 31 January 1992, Section Fifteen of the Superior Court of Barcelona dismissed Mr. Balaguer's appeal because the contentious action of Ms. Montalvo before the Badalona Court was deemed to take precedence.

B. Contentious proceedings of minor jurisdiction

1. On 10 January 1991, in the contentious proceedings instituted by Ms. Montalvo in respect of parental authority and custody of the child, Mr. Balaguer challenged the competence of the Badalona Court by entering a written plea to the jurisdiction on the grounds that he was domiciled in Barcelona.

2. Procedural order of 17 January 1991 acknowledging the plea and recording that the issue of competence had been raised.

3. Answer by the Government Attorney to the objection on the issue of competence, dated 4 March 1991, proposing that it should be dismissed as being untimely, since it should have been raised within a period of six days following the summons to answer the case.

4. Procedural order of 6 May 1991 calling for evidence on the contested issue.

5. Procedural order of 10 July 1991 stating that the issue is awaiting decision.

6. On 12 September 1991, Mr. Balaguer submits to the Court information about his journalistic activities in Barcelona.

7. On 16 September 1991, the Court requests clarification from the Barcelona City Hall.

8. On 19 September 1991, the Administrative Division of the High Court of Justice of Catalonia requests information from the Court concerning the complaint made by Mr. Balaguer seeking to establish judicial liability on the part of members of the Badalona Third Chamber.

9. On 24 September 1991, the Administrative Division of the High Court of Justice of Catalonia receives information from the Court concerning the accusation made by Mr. Balaguer.

10. On 1 October 1991, it is agreed to schedule hearings for the 16th of that month.

11. On 15 October 1991, the General Council of the Judiciary is informed of the steps being taken in the case, in view of its interest following the complaint by Mr. Balaguer.

12. On 16 October 1991, the parties' counsel and advocates do not appear for the hearings.

13. On 18 October 1991, the attorney for Ms. Carmen Montalvo Quiñones requests acceptance of his withdrawal from the case.

14. On 28 October 1991, the Association of Attorneys is requested to appoint a new attorney for Ms. Montalvo Quiñones.

15. On 31 January 1992, the new attorney is appointed.

16. On 21 February 1992, the court decides to make a further request to the Barcelona City Hall for clarification of Mr. Balaguer's residential status, such clarification being required in order to resolve the interlocutory matter regarding competence raised by Mr. Balaguer.

4.3 As to the duration of the proceedings, the State party affirms that the author himself is to blame, because he has engaged various procedures that have delayed final adjudication of his case. Moreover, if he claims that the proceedings are too slow, he should have filed and still could file a complaint under article 24 of the Spanish Constitution.

4.4 The State party concludes that since the issues raised by Mr. Balaguer are being dealt with by the Spanish courts in the exercise of Spanish sovereignty, domestic remedies have not been exhausted, and that the communication should be declared inadmissible.

4.5 With regard to the merits, the State party indicates that on two occasions the author misused his visiting rights by keeping his daughter longer than permitted. It denies any discrimination in the pertinent Spanish law and indicates, inter alia, that the competent judge acted pursuant to the law applicable in 1986 (article 159 of the Civil Code), which provided as follows: "if the parents are separated and do not decide by mutual agreement, male and female children less than seven years of age shall remain in the custody of the mother, unless the judge for special reasons rules otherwise". Article 160 provides that "the father and the mother, even if not exercising parental authority, shall have the right of access to their minor children". The State party contends that these provisions are fully compatible with the Covenant and refers in this connection to the Committee's views on communication No. 201/1985, Hendriks v. the Netherlands. a/

5.1 As to the delays in the proceedings, the author informed the Committee on 21 August 1991 that:

(a) From the date of his initial petition for visiting rights (relación paterno-filial) there has been an interval of 1,747 days (5 and one half years as of the time of the present decision by the Committee);

(b) The interval between the Badalona Court's order and the Superior Court's confirmatory order was 360 days;

(c) The interval between the Superior Court's order and the Badalona Court's order of suspension was 238 days.

5.2 He further adds that following the order by the court of first instance suspending an order from a superior court, proceedings have been delayed for no apparent reason:

(a) The interval between the submission of the appeal against the suspension order (22 March 1990) and the transfer of the case to the Superior Court was 300 days;

(b) The time elapsed from the submission of the appeal (22 March 1990) to date (August 1991) has been 517 days.

5.3 The author thus complains that as at August 1991 the court had not decided on his application for visiting arrangements and had not made a ruling, although 1,747 days had elapsed.

5.4 By a letter dated 24 February 1992 the author challenges the rationale of the decision of the Superior Court of Barcelona of 31 January 1992 suspending his previously recognized right to access, which he had been unable to exercise in view of "the mother's intransigence and opposition in attitude of revenge". He adds that this last decision under the regime of voluntary jurisdiction is not subject to appeal.

5.5 The author claims that the application of domestic remedies in his case has been unreasonably prolonged, within the meaning of article 5, paragraph 2, of the Optional Protocol. In this context he refers to the Committee's admissibility decision in communication No. 238/1987. b/

The Committee's decision on admissibility

6.1 During its forty-fourth session, in March 1992, the Committee considered the admissibility of the communication. The Committee first considered whether the author had standing to act on his daughter's behalf, as he was not the custodial parent. It noted that it was evident that the author's daughter could not herself submit a communication to the Committee, and further observed that the bond between a father and his daughter, as well as the nature of the allegations in the case, were sufficient to justify representation of the author's daughter by her father.

6.2 The Committee ascertained that the same matter was not being considered under another procedure of international investigation or settlement.

6.3 As to the requirement of exhaustion of domestic remedies, the Committee noted the State party's indication that proceedings in the case remained pending. It observed that Mr. Balaguer's attempts to vindicate a right of access to his daughter had begun in 1986 and that he had not seen his daughter for several years. Taking into account the proviso in article 5, paragraph 2 (b), about undue prolongation of remedies, coupled with the fact that the situation (in 1992) prevented both the author and his daughter from having contact with each other, the Committee deemed it unreasonable to expect the author to continue to await a final decision on custody and visiting rights and considered a delay of over five years in the determination, at first instance, of a right of access in custodial disputes to be excessive. It concluded that article 5, paragraph 2 (b), did not preclude it from considering the merits of the case.

6.4 On 25 March 1992, the Committee declared the communication admissible in so far as it appeared to raise issues under articles 23, paragraphs 1 and 4; 24, paragraph 1; and 26 of the Covenant.

The State party's submission on the merits and the author's comments thereon

7.1 In its submission under article 4, paragraph 2, of the Optional Protocol dated 16 November 1992, the State party challenges the Committee's conclusion that the author has standing to act on his daughter's behalf. In this context, it notes that it ascertained that:

(a) The author never complied with his obligations, agreed to in January 1987 with the child's mother, to contribute financially to the girl's upbringing;

(b) His allegations relating to the poor physical health of his daughter have proven false;

(c) His allegations relating to the presumed disorderly lifestyle of the mother have been proven wholly false;

(d) The author never purported to act as representative of his daughter in the domestic judicial proceedings.

7.2 As to whether the same matter is under examination by another instance of international investigation or settlement, the State party questions the veracity of the author's initial submissions to the Committee, given that:

(a) He has written twice to the office of examining magistrate of Badalona with indications that his case is pending before the "international court of justice" (tribunal internacional de justicia) so as to vindicate his rights;

(b) He has indicated to the same office that he has presented his case to the United Nations Educational, Scientific and Cultural Organization (UNESCO) in Paris, in his function as "secretary-general" of a non-governmental organization.

In the circumstances, the State party requests the Committee's confirmation that the requirements of article 5, paragraph 2 (a), of the Protocol have been met.

7.3 As to the issue of exhaustion of domestic remedies, the State party reiterates that both in respect of non-contentious jurisdiction and contentious proceedings of minor jurisdiction (see paragraph 4.2 above), available and effective domestic remedies have not been exhausted. With respect to the purported "undue prolongation" of domestic remedies, the State party emphasizes that this rule is inapplicable in the author's case, as all the delays in the proceedings (both non-contentious and contentious) are solely attributable to Mr. Balaguer. Thus, the author's own behaviour and his repeated refusal to comply with the terms of access initially agreed upon led to the decision of the Badalona Court of 16 March 1990 to suspend proceedings under non-contentious jurisdiction. As to the contentious jurisdiction, the State party recalls that the author himself is the defendant in these proceedings - as a result, he has seen fit to delay these proceedings as much as possible, either by challenging the jurisdiction of the Court of Badalona or by changing legal representatives. The State party notes that all legal representatives assigned to or chosen by the author have, after varying periods of time, refused to represent him any further.

7.4 The State party explains that the custody of children (patria potestad) is governed by articles 154, 156 and 159 of the Civil Code. Article 159 was amended in October 1990 by Law 11/1990, out of concern that the previous provision, which as a rule gave custody to the mother save under exceptional circumstances, discriminated on the basis of sex. Under the provision as amended, the judge must decide, in the best interest of the children, which of the parents will be awarded custody and, to the extent that this is possible and reasonable, hear the children; it is mandatory to hear children over the age of 12. The State party points out that at no point, before the change in legislation or afterwards, did the author seek custody of his daughter, either before the local courts or before the Committee. By contrast, it was the girl's mother who, since the end of 1989, has sought to obtain a ruling on the exclusive custody of the child.

7.5 The State party recalls that the right of access of parents to their children is governed by article 160 of the Civil Code. Under article 159, paragraph 3, the judge decides on the modalities of access and on the special conditions of access, with a view to avoiding harm to the children. The State party rejects as "totally unjustified" and unsubstantiated the author's claim that his right of access has been violated ("Es una ... denuncia radicalmente falsa").

7.6 The State party affirms that article 23, paragraph 1, does not apply in the author's case. It argues that the cohabitation, of limited duration, from April 1985 until shortly after the birth of Maria del Carmen, between the author, a 44-year old married man, and Carmen Montalvo, a 17-year old minor, does not qualify as a "family" within the meaning of article 23, paragraph 1. Furthermore, the relationship between the author and Ms. Montalvo, highly problematic while it lasted and never placed on firm legal grounds, cannot, in the State party's opinion, be deemed a "fundamental [element] of society" which is entitled to "protection by society and the State". Rather, the State party qualifies the author's behaviour as bigamy.

7.7 In the State party's opinion, article 23, paragraph 4, cannot apply in the author's case either, as the author never formalized his relationship with Ms. Montalvo, either through marriage or other legal arrangements. As a result, there cannot be any question of a "dissolution" of a marriage within the meaning of article 23, paragraph 4, first sentence, which would trigger the State party's obligation to guarantee the equality of rights and responsibilities of spouses. The State emphasizes that the author was married when a child was born out of his relationship with Ms. Montalvo.

7.8 As to the alleged violation of article 24, paragraph 1, the State party affirms that the author's daughter has not suffered discrimination of any type, and that, as a minor, she is given the requisite measures of protection, both by her mother and by the State.

7.9 The State party dismisses as absolutely unfounded ("radicalmente falsa") the author's allegations under article 26, namely that he is discriminated against in relation to his right of access to his daughter. It explains that under Spanish legislation, no distinction is made between legitimate and illegitimate children; for both, the parents have the same rights and responsibilities, which are guaranteed by law. In particular, any parent has the right of access to his or her child; in conflict situations, it is incumbent upon the (family) judge to take the necessary measures to avoid any harm to the children. The procedure, the State party submits, was strictly followed in the author's case.

7.10 In this context, the State party recalls that the author and Ms. Montalvo agreed, in January 1987 and with the approval of a judge, upon a visiting rights regime, under which the girl could spend several days during every second weekend ("unos dias") with the author. The first time the author made use of this right, he disappeared with the child for four days, and the mother had to travel to Paris, where she found the child, according to the State party, in disgraceful circumstances ("en lamentables condiciones"). The second time, the author once again took off with his daughter, this time for four months, during which he did not maintain a fixed domicile, taking refuge, at one point, in a religious institution. Those incidents, the State party affirms, did not deprive the author of his right of access.

7.11 After appropriate psychological tests, the parents, again with the judge's approval, agreed that the author could visit his daughter in an appropriate public institution or public place. This form of contact between father and daughter produced unsatisfactory results, as the child displayed signs of anguish and discomfort during the visits. Thereafter, the mother proposed, and the judge agreed, that contacts between the author and his daughter take place at her home; under the terms of this agreement, the author would be allowed to see his daughter alone, in the mother's absence but with the assistance of the police (Mossos d'esquadra).

7.12 According to the State party, the author rejected this form of contact with his daughter. Rather, he requested that the child be brought to an orphanage ("un establecimiento de acogida, es decir un orfanato"), where he would then visit her. Faced with this attitude of the author, and given that the mother had, in the meantime, initiated judicial proceedings, the judge suspended non-contentious proceedings by decision of 14 March 1990. The State party underlines that this decision did not deny the author his right of access to his daughter.

7.13 The author, rather than accepting the visiting rights regime negotiated earlier, proceeded to file recourse upon recourse, requesting that the initial visiting rights regime of January 1987 be reinstated. The State party notes that, significantly, the author has never filed similar requests in the context of the contentious proceedings. The State party concludes that no one, be it the mother, the authorities or the judge, has denied the author the right of access to his daughter; rather, the latter has simply refused to avail himself of the formula deemed by all to be the one that is in the child's best interest, namely contacts between child and father in the mother's home but in her absence.

7.14 In the light of all of the above, and given that the author has at times chosen to misrepresent his situation and deliberately to distort his claims both before the local courts and before the Human Rights Committee, the State party requests that the Committee dismiss Mr. Balaguer's complaint as an abuse of the right of submission.

8.1 In his comments, dated June and 6 September 1993, the author dismisses the State party's submission as untruthful, distorting the facts, devious and reflecting the outdated societal and family concepts of the Spanish authorities and/or the law. The Committee, after carefully examining the author's comments, however, feels obliged to note that they frequently amount to critical comments directed against the government official responsible for the State party's submission in the instant case. To the extent that this is the case, the Committee will not consider the author's comments.

8.2 Mr. Balaguer reaffirms that he is entitled to represent his daughter before the Committee, not however by refuting the State party's observations but by reference to paragraph 6.2 of the Committee's decision on admissibility. He confirms that his case has not been presented to another instance of international investigation or settlement and contends that the State party's doubts in this respect are designed to discredit him.

8.3 To the State party's reaffirmation that domestic remedies have not been exhausted and that delays in the adjudication of the matter must be attributed to the author himself, Mr. Balaguer replies that the judge of the Badalona Court has never seen fit to handle the requests to determine the issue of custody and visiting rights properly and in accordance with the applicable law. No indication is, however, given as to which laws and regulations have not been observed by the State party's judicial authorities. The author adds that he cannot exhaust available domestic remedies by way of appeal or amparo, since the court of first instance had not handed down a decision at first instance more than seven years after his initial petition.

8.4 The author reaffirms that he is a victim of violations of articles 23, paragraphs 1 and 4; 24, paragraph 1; and 26; he does so by reference to his earlier submissions, which in his opinion clearly demonstrate that his allegations are well-founded. In particular, he submits that the relationship with his daughter must be subsumed under the term "family" within the meaning of article 23, paragraph 1, and that the family unit has not benefitted from the requisite protection of the State.

8.5 Apart from violations of the Covenant, the author contends that the Spanish authorities have violated article 9 of the Convention on the Rights of the Child in his case, and in particular of paragraph 3 of this provision, which he claims guarantees the contact with both mother and father for children whose parents are separated. It is submitted that the attitude of the judicial authorities in the case constitutes a violation of article 9 of the Convention, notwithstanding the Government's assurance that the Convention would be incorporated into domestic law.

8.6 The author accuses the State party of not citing, or citing incorrectly, the applicable domestic laws and regulations, the relevant jurisprudence of domestic tribunals, or relevant international instruments. A careful analysis of his comments reveals, however, that he does not himself cite any provisions of the Spanish Civil Code, the Code of Civil Procedure, regulations governing family relations or the jurisprudence of the domestic courts, save for unidentified excerpts of Supreme Court or Constitutional Court decisions.

Review of admissibility issues and examination of the merits

9.1 The Committee has considered the present communication in the light of all the information provided by the parties. It takes note of the State party's reiterated request that the complaint be dismissed as an abuse of the right of submission, as well as the author's rebuttal.

9.2 The Committee has taken note of the State party's observations questioning the decision on admissibility of 25 March 1992. Having duly considered the arguments summarized in paragraphs 7.1 to 7.3 above, the Committee concludes that there is no reason to revise its decision on admissibility. c/ Firstly, in respect of the question of the author's standing to represent his daughter, it reiterates that standing under the Optional Protocol may be determined independently of national regulations and legislation governing an individual's standing before a court of law. This means that regardless of what Mr. Balaguer did to represent his daughter's interests before the Spanish courts, the considerations in paragraph 6.2 above apply. Secondly, the Committee has ascertained that the author's case is not pending before another instance of international investigation or settlement. Finally, while it is true that many delays in the proceedings must be attributed to the author himself, it none the less remains that after several years of contentious proceedings, there is no evidence of a judicial decision at first instance. In a dispute about custody rights and access to children, the Committee considers this delay to be unreasonable.

10.1 On the merits, the questions before the Committee concern the scope of articles 23, paragraphs 1 and 4; and 24, paragraph 1; i.e. whether or not these provisions guarantee an unqualified right of access for a divorced or separated parent, and a child's right to have contact with both parents. Another issue is whether decisions on custody and access rights in the case have been based on distinctions made between fathers and mothers and, if so, whether these distinctions are based on objective and reasonable criteria, as follows from the application of article 26 of the Covenant.

10.2 The State party has argued that article 23, paragraphs 1 and 4, do not apply to the case, as the author's unstable relationship with Ms. Montalvo cannot be subsumed under the term "family", and no marital ties between the author and Ms. Montalvo ever existed. The Committee begins by noting that the term "family" must be understood broadly; it reaffirms that the concept refers not solely to the family home during marriage or cohabitation, but also to the relations in general between parents and child. d/ Some minimal requirements for the existence of a family are, however, necessary, such as life together, economic ties, a regular and intense relationship, etc.

10.3 In the instant case, irrespective of the nature of the author's relationship with Ms. Montalvo, the Committee observes that the State party has always acknowledged that the relations between the author and his daughter were protected by the law and that the mother, between 1986 and 1990, never objected to the author's contacts with his daughter. It was only after Mr. Balaguer continuously failed to observe, and objected to, the modalities of his right of access, that she sought exclusive custody and non-contentious proceedings were suspended. The Committee concludes that there has been no violation of article 23, paragraph 1.

10.4 The Committee further notes that article 23, paragraph 4, does not apply in the instant case, as Mr. Balaguer was never married to Ms. Montalvo. If paragraph 4 is placed into the overall context of article 23, it becomes clear that the protection of the second sentence refers only to children of the marriage which is being dissolved. In any event, the material before the Committee justifies the conclusion that the State party's authorities, when determining custody or access issues in the case, always took the child's best interests into consideration. This is true also for the decisions of the Third Chamber of the Court of Badalona, which the author has singled out in particular.

10.5 The author has claimed a violation of article 24, paragraph 1, since his daughter, as a minor, has not benefited from the appropriate measures of protection, by law or otherwise, on the part of her family and the State. The Committee cannot share this conclusion. On the one hand, the girl's mother has, on the basis of the available documentation, fulfilled her obligations as custodian of the child; secondly, there is no indication that the applicable Spanish law, in particular sections 154, 156, 159 and 160 of the Civil Code, do not provide for appropriate protection of children upon dissolution of a marriage or the separation of unmarried parents.

10.6 Finally, having examined the material before it, the Committee concludes that no issues arise under article 26 in the circumstances of the case. There is no indication that the author was treated arbitrarily and on the basis of unreasonable criteria by the Spanish authorities, or that he was treated differently from others in a similar situation.

11. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it do not reveal a breach by the State party of any of the provisions of the Covenant.

[Adopted in English, French and Spanish, the English text being the original version.]

Notes

a/ Official Records of the General Assembly, Forty-third Session, Supplement No. 40 (A/43/40), annex VII.H, views adopted on 27 July 1988.

b/ Ibid., Forty-fourth Session, Supplement No. 40 (A/44/40), annex X.I, Floresmilo Bolaños v. Ecuador, views adopted on 26 July 1989.

c/ The Committee regrets that subsequent to the decision on admissibility, the parties have become locked in disputes that are of little relevance to the content of the initial communication. It notes that the file reveals that the author used his demarches before the Human Rights Committee for purposes of the proceedings, to which he is party, before the Court of Badalona. Thus, it transpires that he used United Nations stationery in correspondence with the Court of Badalona, although he was not authorized to do so. While these occurrences do not have a direct bearing on the examination of communication No. 417/1990, they may discredit the procedure under the Optional Protocol.

d/ See Official Records of the General Assembly, Forty-third Session, Supplement No. 40 (A/43/40), annex VII.H, communication No. 201/1985 (Hendriks v. the Netherlands), views adopted on 27 July 1988, para. 10.3.

Appendix

Individual opinion (concurring) submitted by Mrs. Elizabeth Evatt under rule 94, paragraph 3, of the rules of procedure of the Committee on Human Rights, concerning the Committee's views on communication No. 417/1990 (Manuel Balaguer Santacana v. Spain)

I agree with the Committee's conclusion that there has been no violation of the author's rights under the Covenant. I agree also that, in the circumstances of the case, it is not necessary to apply article 23, paragraph 4, since the measures of protection required for a minor under article 24, paragraph 1, also require that decisions about custody and access (visiting rights) be decided on the basis of the child's best interests.

I do not agree, however, with an interpretation of the concept of "marriage" in article 23, paragraph 4, which would automatically exclude its application to relationships which, while not "formal" marriages, are in the nature of marriage and share many of its attributes including joint responsibility for the care and upbringing of children. Legal regimes applying to such relationships should, in my view, be in conformity with article 23, paragraph 4.

[Done in English, French and Spanish, the English text being the original version.]

Q. Communication No. 418/1990, C. H. J. Cavalcanti Araujo-Jongen v. the Netherlands (views adopted on 22 October 1993, forty-ninth session)

Submitted by:	C. H. J. Cavalcanti Araujo-Jongen (represented by counsel)
Alleged victim:	The author
State party:	The Netherlands
Date of communication:	16 August 1990 (initial submission)
Date of decision on admissibility:	20 March 1992

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 22 October 1993,

Having concluded its consideration of communication No. 418/1990, submitted to the Human Rights Committee by Mrs. C. H. J. Cavalcanti Araujo-Jongen under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, her counsel and the State party,

Adopts its views under article 5, paragraph 4, of the Optional Protocol.

The facts as submitted by the author

1. The author of the communication is Mrs. C. H. J. Cavalcanti Araujo-Jongen, a citizen of the Netherlands, residing at Diemen, the Netherlands. She claims to be a victim of a violation by the Netherlands of article 26 of the International Covenant on Civil and Political Rights. She is represented by counsel.

2.1 The author was born in 1939 and is married to Mr. Cavalcanti Araujo. From September 1979 to January 1983, she was employed as a part-time secretary for 20 hours a week. As of 1 February 1983, she was unemployed. In virtue of the Unemployment Act she was granted unemployment benefits. In conformity with the provisions of the Act, the benefits were granted for the maximum period of six months (until 1 August 1983). The author subsequently found new employment, as of 24 April 1984.

2.2 Having received benefits under the Unemployment Act for the maximum period, the author, as an unemployed person in 1983-1984, contends that she was entitled to benefits under the Unemployment Benefits Act, for a maximum period of two years. These benefits amounted to 75 per cent of the last salary, whereas benefits under the Unemployment Act amounted to 80 per cent of the last salary.

2.3 The author, on 11 December 1986, applied for benefits under the Unemployment Benefits Act to the Municipality of Leusden, her then place of residence. Her application was rejected on 8 April 1987 on the grounds that as a married woman who did not qualify as a breadwinner, she did not meet the requirements of the Act. The rejection was based on article 13, paragraph 1, subsection 1 of the Unemployment Benefits Act, which did not apply to married men.

2.4 On 2 July 1987, the Municipality confirmed its earlier decision. The author subsequently appealed to the Board of Appeal at Utrecht, which, by decision of 22 February 1988, declared her appeal to be well-founded; the decision of 8 April 1987 was set aside.

2.5 The Municipality then appealed to the Central Board of Appeal, which, by judgement of 10 May 1989, confirmed the Municipality's earlier decisions and set aside the Board of Appeal's decision. The author claims she has exhausted all available domestic remedies.

The complaint

3.1 In the author's opinion, the denial of benefits under the Unemployment Benefits Act amounts to discrimination within the meaning of article 26 of the Covenant. She refers to the views of the Human Rights Committee regarding communications No. 172/1984 (Broeks v. the Netherlands) and No. 182/1984 (Zwaan-de Vries v. the Netherlands).

3.2 In its judgement of 10 May 1989, the Central Board of Appeal concedes, as in earlier judgements, that article 26 in conjunction with article 2 of the International Covenant on Civil and Political Rights applies also to the granting of social security benefits and similar entitlements. The Central Board further observed that the explicit exclusion of married women, unless they meet specific requirements that are not applicable to married men, implies direct discrimination on the ground of sex in relation to (marital) status. However, the Central Board held that "as far as the elimination of discrimination in the sphere of national social security legislation is concerned, in some situations there is room for a gradual implementation with regard to the moment at which unequal treatment ... cannot be considered acceptable any longer, as well as in view of the question of when, in such a case, the moment has come at which article 26 of the Covenant in relation to national legislation cannot be denied direct applicability any longer". The Central Board concluded in relation to the provision in the Unemployment Benefits Act that article 26 of the Covenant could not be denied direct applicability after 23 December 1984, the time-limit established by the Third Directive of the European Economic Community (EEC) regarding the elimination of discrimination between men and women within the Community.

3.3 The author notes that the Covenant entered into force for the Netherlands on 11 March 1979, and that, accordingly, article 26 was directly applicable as of that date. She contends that the date of 23 December 1984 was chosen arbitrarily, as there is no formal link between the Covenant and the Third EEC Directive. The Central Board had not, in earlier judgements, taken a consistent view with regard to the direct applicability of article 26. In a case relating to the General Disablement Act, for instance, the Central Board decided that article 26 could not be denied direct applicability after 1 January 1980.

3.4 The author submits that the Netherlands had, when ratifying the Covenant, accepted the direct applicability of its provisions, in accordance with articles 93 and 94 of the Constitution. Furthermore, even if a gradual elimination of discrimination were permissible under the Covenant, the transitional period of almost 13 years between the adoption of the Covenant in 1966 and its entry into force for the Netherlands in 1979, was sufficient to enable it to adapt its legislation accordingly.

3.5 The author claims she suffered damage as a result of the application of the discriminatory provisions in the Unemployment Benefits Act, in that benefits were refused to her for the period of 1 August 1983 to 24 April 1984. She contends that these benefits should be granted to women equally as to men as of 11 March 1979 (the date the Covenant entered into force for the Netherlands), in her case as of 1 August 1983, notwithstanding measures adopted by the Government to grant married women WWV benefits equally after 23 December 1984.

The Committee's decision on admissibility

4.1 During its forty-fourth session, the Committee considered the admissibility of the communication. It noted that the State party, by submission of 11 December 1990, raised no objections against admissibility and conceded that the author had exhausted available domestic remedies.

4.2 On 20 March 1992, the Committee declared the communication admissible inasmuch as it might raise issues under article 26 of the Covenant.

State party's submission on the merits and author's comments

5.1 By submission of 8 December 1992, the State party argues that the author's communication is unsubstantiated, since the facts of the case do not reveal a violation of article 26 of the Covenant.

5.2 The State party submits that article 13, paragraph 1, subsection 1 of the Unemployment Benefits Act, on which the rejection of the unemployment benefit of the author was based, was abrogated by law of 24 April 1985. In this law, however, it was laid down that the law which was in force to that date - including the controversial article 13, paragraph 1, subsection 1 - remained applicable in respect of married women who had become unemployed before 23 December 1984. As these transitionary provisions were much criticized, they were abolished by Act of 6 June 1991. As a result, women who had been ineligible in the past to claim benefits under the Unemployment Benefits Act because of the breadwinner criterion, can claim these benefits retroactively, provided they satisfy the other requirements of the Act. One of the other requirements is that the applicant be unemployed on the date of application.

5.3 The State party therefore contends that if the author had been unemployed on the date of application for benefits under the Unemployment Benefits Act, she would be eligible for retroactive benefits on the basis of her unemployed status as from 1 February 1983. However, since the author had found other employment as of April 1984, she could not claim retroactive benefits under the Unemployment Benefits Act. The State party emphasizes that since the amendment of the law on 6 June 1991, the obstacle to the author's eligibility for a benefit is not the breadwinner criterion, but her failure to satisfy the other requirements under the law that apply to all, men and women alike.

5.4 The State party submits that by amending the law in this respect, it has complied with the principle of equality before the law as laid down in article 26 of the Covenant.

5.5 Moreover, the State party reiterates the observations it made in connection with communications Nos. 172/1984 a/ and 182/1984. b/ It emphasizes that the intent of the breadwinner criterion in the Unemployment Benefits Act was not to discriminate between married men and married women, but rather to reflect a fact of life, namely, that men generally were breadwinners, whereas women were not. The State party argues therefore that the law did not violate article 26 of the

Covenant, since objective and reasonable grounds existed at the time to justify the differentiation in treatment between married men and married women.

5.6 Furthermore, the State party argues that the implementation of equal rights in national legislation depends on the nature of the subject-matter to which the principle of equality must be applied. The State party contends that in the field of social security, differentiation is necessary to bring about social justice. The incorporation of the breadwinner criterion in WWV should be seen in this light, as its object was to limit the eligibility of the benefit to those who were breadwinners. In this context, the State party refers to the individual opinion c/ appended to the Committee's views in communication No. 395/1990, d/ which states that "article 26 of the Covenant should not be interpreted as requiring absolute equality or non-discrimination in [the field of social security] at all times; instead it should be seen as a general undertaking on the part of States parties to the Covenant to review regularly their legislation in order to ensure that it corresponds to the changing needs of society".

5.7 In this connection, the State party submits that it regularly adjusts its social security legislation to accommodate shifts in the prevailing social climate and/or structure, as it has done in the Unemployment Benefits Act. The State party concludes that by amending the Act in 1991, it has complied with its obligations under article 26 and article 2, paragraphs 1 and 2, of the Covenant.

6.1 By submission of 8 March 1993, counsel stresses that the central issue in the communication is whether article 26 of the Covenant had acquired direct effect before 23 December 1984, more specifically on 1 August 1983. She argues that the explicit exclusion of married women from benefits under the Unemployment Benefits Act constituted discrimination on the grounds of sex in relation to marital status. Counsel argues that, even if objective and reasonable grounds existed to justify the differentiation in treatment between married men and married women at the time of the enactment of the provision, conditions in society no longer supported such differentiation in August 1983.

6.2 Counsel submits that, under the amended law, it is still not possible for the author, who has found new employment, to claim the benefits she was denied before. In this connection, she points out that the author failed to apply for a benefit during the period of her unemployment because the law at that time did not grant her any right to a benefit under the Unemployment Benefits Act. The author applied for a benefit after the breadwinner requirement for women was dropped as from 23 December 1984, but had by then found new employment. She therefore argues that the discriminatory effect of the said provision of the Act is not abolished for her, but still continues.

6.3 Counsel refers to the Committee's views in communications Nos. 172/1984 a/ and 182/1984 b/ and argues that even if a transitional period is acceptable to bring the law in compliance with the Covenant, the length of that period, from the entry into force of the Covenant (11 March 1979) to the amendment of the law (6 June 1991), is unreasonable. Counsel therefore maintains that article 26 of the Covenant has been violated in the author's case by the refusal of the State party to grant her a benefit under the Unemployment Benefits Act for the period of her unemployment, from 1 August 1983 to 24 April 1984.

Examination of the merits

7.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

7.2 The questions before the Committee are whether the author is a victim of a violation of article 26 of the Covenant (a) because the state and application of the law in August 1983 did not entitle her to benefits under the Unemployment Benefits Act, and (b) because the present application of the amended law still does not entitle her to benefits for the period of her unemployment from 1 August 1983 to 24 April 1984. In this connection, the author has also requested the Committee to find that the Covenant acquired direct effect in the Netherlands as from 11 March 1979, or in any event as from 1 August 1983.

7.3 The Committee recalls its earlier jurisprudence and observes that, although a State is not required under the Covenant to adopt social security legislation, if it does, such legislation must comply with article 26 of the Covenant.

7.4 The Committee observes that even if the law in force in 1983 was not consistent with the requirements of article 26 of the Covenant, that deficiency was corrected upon the retroactive amendment of the law on 6 June 1991. The Committee notes that the author argues that the amended law still indirectly discriminates against her because it requires applicants to be unemployed at the time of application, and that this requirement effectively bars her from retroactive access to benefits. The Committee finds that the requirement of being unemployed at the time of application for benefits is, as such, reasonable and objective, in view of the purposes of the legislation in question, namely to provide assistance to persons who are unemployed. The Committee therefore concludes that the facts before it do not reveal a violation of article 26 of the Covenant.

7.5 As regards the author's request that the Committee make a finding that article 26 of the Covenant acquired direct effect in the Netherlands as from 11 March 1979, the date on which the Covenant entered into force for the State party, or in any event as from 1 August 1983, the Committee observes that the method of incorporation of the Covenant in national legislation and practice varies among different legal systems. The determination of the question whether and when article 26 has acquired direct effect in the Netherlands is therefore a matter of domestic law and does not come within the competence of the Committee.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it do not disclose a violation of any provision of the Covenant.

[Done in English, French and Spanish, the English text being the original version.]

Notes

a/ Official Records of the General Assembly, Forty-second Session, Supplement No. 40 (A/42/40), annex VIII.B, Broeks v. the Netherlands, views adopted on 9 April 1987.

b/ Ibid., annex VIII.D, Zwaan-de Vries v. the Netherlands, views adopted on 9 April 1987.

c/ Appended by Messrs. Nisuke Ando, Kurt Herndl and Briame Ndiaye.

d/ Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40 (A/47/70), annex IX.P, Sprenger v. the Netherlands, views adopted on 31 March 1992.

R. Communication No. 425/1990, A. M. M. Doesburg Lannooij Neefs v. the Netherlands (views adopted on 15 July 1994, fifty-first session)

Submitted by:	A. M. M. Doesburg Lannooij Neefs
Victim:	The author
State party:	The Netherlands
Date of communication:	15 August 1990 (initial submission)
Date of decision on admissibility:	26 July 1993

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 15 July 1994,

Having concluded its consideration of communication No. 425/1990 submitted to the Human Rights Committee by Mr. A. M. M. Doesburg Lannooij Neefs under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts its views under article 5, paragraph 4, of the Optional Protocol.

1. The author of the communication, dated 15 August 1990, is Mr. A. M. M. Doesburg Lannooij Neefs, a Dutch citizen, born in 1958 and presently residing in Naarden, the Netherlands. He claims to be the victim of a violation of article 26 of the International Covenant on Civil and Political Rights by the Netherlands.

The facts as submitted by the author

2.1 In 1983, the author concluded a sublet contract with his mother, with whom he shared a house. On 29 September 1986, being unemployed, he applied for a benefit under the Social Security Act (*Algemene Bijstandswet*), since his allowance under the Unemployment Benefits Act (*Wet Werkloosheidsvoorziening*) would expire on 1 October 1986.

2.2 Under the Social Security Act, a person can receive a benefit if he does not have sufficient means to provide for his cost of living. The amount of the benefit depends on the specific circumstances of the applicant; differentiation is made, *inter alia*, between single persons and persons who share a household with others. Under article 1 (4) (a) of the Royal Decree of 13 March 1985 implementing the Act, a subtenant or boarder is considered to be a single person living alone and thus is entitled to a full benefit under the Act. However, the Decree limits the application of this article by declaring that a person who shares a household with a close relative cannot be considered a single subtenant or boarder unless the relative is a brother or a sister and the household is shared on a commercial basis.

2.3 On 28 October 1986, the Naarden municipality decided to grant the author a reduced benefit under the Social Security Act, based on the fact that he was sharing a household with his mother. The author sought review of this decision on 10 November 1986, and after receiving no reply within the established one-month time-limit, he appealed under article 41 of the Act to the North Holland provincial authorities, arguing, inter alia, that the distinction in the Decree between boarders and subtenants who share a house with a non-relative and those who share a house with a relative amounted to unlawful discrimination. On 24 April 1987, the Provincial Appeal Commission (Commissie Beroepszaken Administratieve Geschillen) rejected the author's appeal.

2.4 On 9 August 1990, the Council of State, Division for Administrative Litigation, (Raad van State, Afdeling Geschillen van Bestuur) rejected the author's subsequent appeal. It considered that the distinction was based on the presumption that close relatives sharing a household did so on a joint account. The Division was of the opinion that this presumption was not unreasonable and that it provided a sufficient justification for the distinction between subtenants or boarders and close relatives sharing a household.

The complaint

3. The author contends that the differentiation in standards applied amounts to discrimination within the meaning of article 26 of the Covenant. He argues that the distinction between close relatives and others, while both are sharing a household on a commercial basis and live in the same circumstances, is unreasonable.

The Committee's decision on admissibility

4. At its forty-eighth session, the Committee considered the admissibility of the communication. The Committee noted that the State party had confirmed that all domestic remedies had been exhausted and that it had raised no other objections to admissibility. On 26 July 1993, the Committee declared the communication admissible inasmuch as it might raise issues under article 26 of the Covenant.

The State party's submission on the merits and the author's comments thereon

5.1 By submissions of 30 March and 29 April 1994, the State party recalls that the author had been granted, as of 1 October 1986, benefits under the Social Security Act. The level of benefits was based on the fact that the author was a single person living with his mother. The State party explains that the purpose of the Social Security Act is to guarantee a minimum income to those who have no or insufficient income of their own. Since the main element in granting the benefits is the need of the applicant, the benefits are related to the specific circumstances of each applicant. To standardize its decision making, the State party has established different categories corresponding to different levels of benefits. According to these standards, a married couple without income will receive benefits amounting to a minimum wage income, a single parent will receive 90 per cent thereof, and a single person with no dependants 70 per cent.

5.2 The State party states that the benefits are intended to cover the necessary costs of living, including the costs of accommodation. It therefore argues that it is reasonable to reduce the level of benefits if the applicant has less expenditures because he or she is sharing a household. As a rule, single persons sharing a household on a non-commercial basis receive 60 per cent of the minimum wage income. Persons sharing a household are presumed to share equally in the costs, regardless of the factual cost distribution. Close family members living in one and the same house or apartment are presumed to share a household on a non-commercial basis. Evidence to the contrary is allowed if an applicant is living with a brother or sister, but not if he is living with a parent. In this connection, the State party argues that this distinction is related to the obligations imposed upon family members under civil law. The Dutch Civil Code imposes upon parents and children a mutual obligation to provide support in the costs of living, but does not contain a similar obligation for brothers and sisters. The State party argues that distinctions between persons who have different obligations towards each other are reasonable and do not constitute a violation of article 26 of the Covenant.

6. In his comments, dated 17 May and 7 June 1994, the author argues that his specific situation calls for an exception to the standards applied to single persons living with a parent, since he is sharing a household with his mother on a commercial basis and therefore should be considered as a single person living alone. He contests the State party's statement that the relationship between a mother and a child is necessarily one of dependency. He argues that the legal obligation to mutual support does not only exist for those parents and children who live in the same house, but also for those who live apart from each other. He further states that his mother is not in a position to contribute to his costs of living. He argues that there is no easy solution to his case, because he has not been able to find a paid job and if he moves out of the household with his mother, he will face high housing costs, since cheap accommodations are difficult to find.

Issues and proceedings before the Committee

7.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

7.2 The Committee refers to its prior jurisprudence and reiterates that although a State is not required under article 26 of the Covenant to adopt social security legislation, if it does, such legislation must comply with article 26 of the Covenant. The right to equality before the law and to the equal protection of the law without any discrimination does not make all differences of treatment discriminatory. A differentiation based on reasonable and objective criteria does not amount to prohibited discrimination within the meaning of article 26. a/

7.3 In the instant case, the Committee notes that the author's claim that he is a victim of a violation of article 26 is based on the fact that he is sharing a household with his mother and on that basis receives a lower level of benefit under the Social Security Act than he would have if he had shared it with a non-relative or with a relative in respect of whom the regulations under the Act allow evidence of a commercially shared household.

7.4 The Committee observes that benefits under the Social Security Act are granted to persons with low or no income in order to provide for their costs of living. The author himself has conceded that his costs of living are reduced since he is sharing a household with his mother, be this on a commercial basis or on a basis of mutual support. In the light of the explanations given by the State party, the Committee finds that the different treatment of parents and children and of other relatives respectively, contained in the regulations under the Social Security Act, is neither unreasonable nor arbitrary, and its application in the author's case does not amount to a violation of article 26 of the Covenant.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it do not reveal a violation by the State party of any of the articles of the Covenant.

[Adopted in English, French and Spanish, the English text being the original version.]

Notes

a/ See inter alia Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40 (A/47/40), annex IX.P, communication No. 395/1990 (M. T. Sprenger v. the Netherlands), views adopted on 31 March 1992, paragraph 7.2); and Ibid., annex IX.R, communication No. 415/1990 (Dietmar Pauger v. Austria), views adopted on 26 March 1992, paragraph 7.3.

S. Communication No. 428/1990, François Bozize v. the Central African Republic (views adopted on 7 April 1994, fiftieth session)

Submitted by:	Yvonne M'Boissona
Victim:	Her brother, François Bozize
State party:	Central African Republic
Date of communication:	14 November 1990
Date of decision on admissibility:	8 July 1992

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 7 April 1994,

Having concluded its consideration of communication No. 428/1990, submitted to the Human Rights Committee by Mrs. M'Boissona, on behalf of her brother, Mr. F. Bozize, under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts its views under article 5, paragraph 4, of the Optional Protocol.

1. The author of the communication is Yvonne M'Boissona, a citizen of the Central African Republic residing at Stains, France. She submits the communication on behalf of her brother, François Bozize, currently detained at a penitentiary at Bangui, Central African Republic. She claims that her brother is a victim of violations of his human rights by the authorities of the Central African Republic, but does not invoke any provisions of the International Covenant on Civil and Political Rights.

The facts as submitted by the author

2.1 The author states that her brother was a high-level military officer of the armed forces of the Central African Republic. On 3 March 1982, he instigated a *coup d'état*; after its failure, he went into exile in Benin. On 24 July 1989, the author's brother was arrested at a hotel in Cotonou, Benin, together with 11 other citizens of the Central African Republic; all were presumed members of the political opposition, the Central African Movement of National Liberation (Mouvement centrafricain de libération nationale). On 31 August 1989, Mr. Bozize and the other opposition activists were repatriated by force, allegedly with the help of a Central African Republic military commando allowed to operate within Benin; this "extradition" is said to have been negotiated between the Governments of Benin and the Central African Republic. The forced repatriation occurred without a formal extradition request having been issued by the Government of the Central African Republic.

2.2 Upon his return to Bangui, Mr. Bozize was imprisoned at Camp Roux, where he allegedly suffered serious maltreatment and beatings. The author claims that her brother was not allowed access to a lawyer of his own choosing, nor to a member of his family. Allegedly, not even a doctor was allowed to see him to provide basic medical care. Furthermore, the sanitary conditions of the prison are said to be deplorable and the food allegedly consists of rotten meat mixed with sand; as a result, the weight of Mr. Bozize dropped to 40 kilograms by the summer of 1990.

2.3 During the night of 10 to 11 July 1990, the prison authorities of Camp Roux reportedly stage-managed a power failure in the sector of town where the prison is located, purportedly to incite Mr. Bozize to attempt an escape. As this practice is said to be common and invariably results in the death of the would-be escapee, Mr. Bozize did not leave his cell. The author contends that in the course of the night, her brother was brutally beaten for several hours and severely injured. This version of the events was confirmed by Mr. Bozize's lawyer, Maître Thiangaye, who was able to visit his client on 26 October 1990 and who noticed numerous traces of beatings and ascertained that Mr. Bozize had two broken ribs. The lawyer also reported that Mr. Bozize was kept shackled, that his reading material had been confiscated and that the prison guards only allowed him out of his cell twice a week. Allegedly, this treatment is known to, and condoned by, President Kolingba and the Ministers of Defence and of the Interior.

2.4 The authorities of the Central African Republic consistently maintain that Mr. Bozize indeed attempted to escape from the prison and that he sustained injuries in the process. This is denied by the author, who points to her brother's weak physical condition in the summer of 1990 and argues that he could not possibly have climbed over the three-metre-high prison wall.

2.5 Mr. Bozize's wife, who currently resides in France, has requested the good offices of the French authorities. By a letter of 29 October 1990, the President of the National Assembly informed her that the French foreign service had ascertained that Mr. Bozize was alive and that he had been transferred to the Kassai prison at Bangui.

2.6 As to the issue of exhaustion of domestic remedies, it is submitted that criminal proceedings against Mr. Bozize were to have been opened on 28 February 1991, allegedly in order to profit from the momentary absence, owing to a trip abroad, of his lawyer. However, the trial was postponed for "technical reasons". Since then, the trial has apparently been postponed on other occasions. Mrs. Bozize complains that in the months following his arrest, her husband was denied access to counsel; later, the family retained the services of a lawyer to defend him. The lawyer, however, was denied authorization to visit his client; the lawyer allegedly also suffered restrictions of his freedom of movement on account of his client.

The complaint

3. It is submitted that the events described above constitute violations of Mr. Bozize's rights under the Covenant. Although the author does not specifically invoke any provisions of the Covenant, it transpires from the context of her submissions that her claims relate primarily to articles 7, 9, 10, 14 and 19 of the Covenant.

The Committee's decision on admissibility

4.1 During its forty-fifth session, in July 1992, the Committee considered the admissibility of the communication. It noted with concern that in spite of two reminders addressed to the State party, in July and September 1991, no information or observations on the admissibility of the communication had been received from the State party. In the circumstances, the Committee found that it was not precluded from considering the communication under article 5, paragraph 2 (b), of the Optional Protocol.

4.2 On 8 July 1992, the Committee declared the communication admissible in so far as it appeared to raise issues under articles 7; 9; 10; 14, paragraphs 1 and 3; and 19 of the Covenant.

Examination of the merits

5.1 The State party did not provide any information in respect of the substance of the author's allegations, in spite of two reminders addressed to it in June 1993 and February 1994. The Committee notes with regret and great concern the absence of cooperation on the part of the State party in respect of both the admissibility and the substance of the author's allegations. It is implicit in article 4, paragraph 2, of the Optional Protocol and in rule 91 of the Committee's rules of procedure that a State party to the Covenant must investigate in good faith all the allegations of violations of the Covenant made against it and its authorities and furnish the Committee with the information available to it. In the circumstances, due weight must be given to the author's allegations, to the extent that they have been substantiated.

5.2 The Committee decides to base its views on the following facts, which have not been contested by the State party. Mr. François Bozize was arrested on 24 July 1989 and was taken to the military camp at Roux, Bangui, on 31 August 1989. There, he was subjected to maltreatment and was held incommunicado until 26 October 1990, when his lawyer was able to visit him. During the night of 10 to 11 July 1990, he was beaten and sustained serious injuries, which was confirmed by his lawyer. Moreover, while detained in the Camp at Roux, he was held under conditions which did not respect the inherent dignity of the human person. After his arrest, Mr. Bozize was not brought promptly before a judge or other officer authorized by law to exercise judicial power, was denied access to counsel and was not, in due time, afforded the opportunity to obtain a decision by a court on the lawfulness of his arrest and detention. The Committee finds that the above amount to violations by the State party of articles 7, 9, and 10 in the case.

5.3 The Committee notes that although Mr. Bozize has not yet been tried, his right to a fair trial has been violated; in particular, his right to be tried within a "reasonable time" under article 14, paragraph 3 (c), has not been respected, as he does not appear to have been tried at first instance after over four years of detention.

5.4 In respect of a possible violation of article 19 of the Covenant, the Committee notes that this claim has remained unsubstantiated. The Committee therefore makes no finding of a violation in this respect.

6. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose violations of articles 7, 9, 10 and 14, paragraph 3 (c), of the Covenant.

7. The Committee is of the view that Mr. François Bozize is entitled, under article 2, paragraph 3 (a), of the Covenant, to an effective remedy, including his release and appropriate compensation for the treatment suffered. The State party should investigate the events complained of and bring to justice those held responsible for the author's treatment; it further is under an obligation

to take effective measures to ensure that similar violations do not occur in the future.

8. The Committee would wish to receive prompt information on any relevant measures taken by the State party in respect of the Committee's views.

[Adopted in English, French and Spanish, the English text being the original version.]

T. Communication No. 440/1990, Youssef El-Megreisi v. the Libyan Arab Jamahiriya (views adopted on 23 March 1994, fiftieth session)

Submitted by:	Youssef El-Megreisi
Victim:	The author's brother Mohammed Bashir El-Megreisi
State party:	Libyan Arab Jamahiriya
Date of communication:	27 December 1990

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 23 March 1994,

Having concluded its consideration of communication No. 440/1990, submitted to the Human Rights Committee by Mr. Youssef El-Megreisi on behalf of his brother, Mr. Mohammed Bashir El-Megreisi, under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication,

Adopts its views under article 5, paragraph 4, of the Optional Protocol.

1. The author of the communication is Youssef El-Megreisi, a stateless individual of Libyan origin, born in Benghazi, Libya, in 1958, currently residing in the United Kingdom of Great Britain and Northern Ireland. He submits the communication on behalf of his brother, Mohammed Bashir El-Megreisi, a Libyan citizen, born in 1956, said to be unable himself to submit the communication. The author claims that his brother is the victim of violations of his human rights by Libya. The Optional Protocol entered into force for the Libyan Arab Jamahiriya on 16 August 1989.

The facts as submitted by the author

2.1 The author states that in January 1989, his family home at Benghazi, where the family, including his brother, his brother's wife and their two children, lived, was searched at dawn. The intruders allegedly were members of the Mukhabarat, the Libyan security police. Mohammed El-Megreisi was asked to dress and accompany them, purportedly to assist in some unspecified security matter. He never returned. The author adds that "no one could visit his brother and no one was given any information about him".

2.2 The author claims that the security police falsely suspected his brother of active involvement in politics. No specific charges were brought against Mohammed El-Megreisi, nor was a trial ever held. The family could not trace him for approximately three years and feared that he had been tortured or killed, which is said to be the usual fate of political detainees in Libya.

2.3 In April 1992, the El-Megreisi family learned that he was still alive, since he was allowed a visit by his wife. According to Mrs. El-Megreisi, the Libyan authorities have told her husband that no charges against him exist and that they have no reason to keep him in detention other than for routine procedures. It is submitted that during his wife's visit, Mohammed El-Megreisi could not comment on the conditions under which he is detained, nor on whether he has been subjected to torture or to other cruel, inhuman or degrading treatment, out of fear of punishment, as meeting places are allegedly bugged and conversations between visitors and prisoners recorded.

2.4 In a submission of September 1992, the author stated that at that time, his brother was detained in a military camp in Tripoli; the name and location of the camp were, however, unknown. The author reiterated that conditions under which prisoners in Libya are detained are cruel and inhuman, without giving further details.

2.5 As to the requirement of exhaustion of domestic remedies, the author has stated, in his initial submission, that the Libyan authorities simply denied that they ever arrested his brother, even though his arrest had been witnessed by the family. In 1990, two London-based non-governmental organizations requested the Libyan authorities to provide clarifications about Mr. El-Megreisi's fate, but received no reply. It appears from the author's submissions that local remedies are deemed to be both unavailable and ineffective.

The complaint

3. Although the author does not invoke specific provisions of the International Covenant on Civil and Political Rights, it appears from his submissions that he considers his brother to be the victim of a violation by Libya of articles 7, 9 and 10.

The Committee's decision on admissibility

4.1 During its forty-sixth session, in October 1992, the Committee considered the admissibility of the communication. It noted with concern that in spite of two reminders addressed to the State party in January and July 1992, no information or observations on the admissibility of the communication had been received from the State party; nor did the State party provide information, as had been requested by the Committee's Special Rapporteur on New Communications on 2 August 1991, on the whereabouts of Mr. Mohammed El-Megreisi since January 1989 and on his state of health. In the circumstances, the Committee found that it was not precluded from considering the communication under article 5, paragraph 2 (b), of the Optional Protocol.

4.2 On 16 October 1992, the Committee declared the communication admissible in so far as it appeared to raise issues under articles 7, 9 and 10 of the Covenant.

Examination of the merits

5.1 The Committee begins by noting that the Optional Protocol entered into force for the Libyan Arab Jamahiriya on 16 August 1989. It observes that it is not precluded from considering the present communication, since the events complained of by the author have continued after 16 August 1989.

5.2 In spite of a reminder addressed to it in October 1993, the State party did not provide any information in respect of the substance of the author's allegations, nor in respect of Mr. M. El-Megreisi's current whereabouts, state of health and conditions of detention, as requested in paragraph 6 (c) of the Committee's decision on admissibility. The Committee notes with regret and great concern the absence of cooperation on the part of the State party, both in respect of the admissibility and of the substance of the author's allegations. It is implicit in article 4, paragraph 2, of the Optional Protocol and in rule 91 of the Committee's rules of procedure that a State party to the Covenant must investigate in good faith all the allegations of violations of the Covenant made against it and its authorities and furnish the Committee with the information available to it. The lack of cooperation from the State party prevents the Committee from fully discharging its functions under the Optional Protocol.

5.3 The Committee therefore bases its assessment on the undisputed facts that Mr. Mohammed El-Megreisi was arrested in January 1989, that no charges were or have been brought against him and that he has not been released to date. In the opinion of the Committee, therefore, he has been subjected to arbitrary arrest and detention, and continues to be arbitrarily detained, contrary to article 9 of the Covenant.

5.4 Moreover, the Committee notes, from the information before it, that Mohammed El-Megreisi was detained incommunicado for more than three years, until April 1992, when he was allowed a visit by his wife, and that after that date he has again been detained incommunicado and in a secret location. Having regard to these facts, the Committee finds that Mr. Mohammed Bashir El-Megreisi, by being subjected to prolonged incommunicado detention in an unknown location, is the victim of torture and cruel and inhuman treatment, in violation of articles 7 and 10, paragraph 1, of the Covenant.

6. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose violations of articles 7, 9 and 10, paragraph 1, of the Covenant.

7. The Committee is of the view that Mr. Mohammed Bashir El-Megreisi is entitled, under article 2, paragraph 3 (a), of the Covenant, to an effective remedy. It urges the State party to take effective measures (a) to secure his immediate release; (b) to compensate Mr. Mohammed El-Megreisi for the torture and cruel and inhuman treatment to which he has been subjected; and (c) to ensure that similar violations do not occur in the future.

8. The Committee would wish to receive information, within 90 days, on any relevant measures taken by the State party in respect of the Committee's views.

[Adopted in English, French and Spanish, the English text being the original version.]

U. Communication No. 441/1990, Robert Casanovas v. France (views adopted on 19 July 1994, fifty-first session)

Submitted by:	Robert Casanovas
Victim:	The author
State party:	France
Date of communication:	27 December 1990 (initial submission)
Date of decision on admissibility:	7 July 1993

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 19 July 1994,

Having concluded its consideration of communication No. 441/1990 submitted to the Human Rights Committee by Mr. Robert Casanovas under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts its views under article 5, paragraph 4, of the Optional Protocol.

1. The author of the communication is Robert Casanovas, a French citizen residing in Nancy. He claims to be the victim of a violation by France of articles 2, paragraph 3 (a) and (b), and 14, paragraph 1, of the International Covenant on Civil and Political Rights.

The facts as submitted by the author

2.1 The author is a former employee of the fire brigade sapeurs-pompiers of Nancy. On 1 September 1987, he was appointed head of the Centre de Secours Principal of Nancy. On 20 July 1988, he was dismissed for alleged incompetence, by decision of the regional and departmental authorities. The author appealed to the Administrative Tribunal (Tribunal Administratif) of Nancy, which quashed the decision on 20 December 1988. Mr. Casanovas was reinstated in his post by decision of 25 January 1989.

2.2 The city administration, however, initiated new proceedings against the author which resulted, on 23 March 1989, in a second decision terminating his employment. The author challenged this decision before the Administrative Tribunal of Nancy on 30 March 1989. On 19 October 1989, the President of the Tribunal ordered the closure of the preliminary inquiry. By a letter of 20 November 1989, Mr. Casanovas requested the President of the Tribunal to put his case on the court agenda at as early a date as possible; this request was repeated on 28 December 1989. By a letter dated 11 January 1990, the President informed him that the matter was not considered urgent and that, since no special circumstances prevailed, it would be registered in chronological order, which implied that the case would not be heard either in 1990 or in 1991.

2.3 On 23 January and again on 2 February 1990, the author notified the Court that he considered such a delay to constitute a breach of article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and, accordingly, requested the inscription of his case on the court calendar, pursuant to articles 506 and 507 of the French Code of Civil Procedure. Again, he received no reply and therefore asked the Tribunal, on 13 February 1990, to acknowledge receipt of his earlier submissions. On 15 March 1990, the Court informed him that he was not being discriminated against, but that the delays encountered were the result of a backlog in the handling of earlier cases dating back to 1986; in the circumstances, it was impossible to examine the case at an earlier date.

2.4 On 21 March 1990, the author once again requested the President of the Administrative Tribunal to hear the case. The request was reiterated on 5 June 1990, but refused by the President of the Court on 11 June 1990.

2.5 On 20 July 1990, Mr. Casanovas appealed to the European Commission of Human Rights, invoking article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. By decision of 3 October 1990, the Commission declared his communication inadmissible, considering that the Convention does not cover procedures governing the dismissal of civil servants from employment.

2.6 As to the requirement of exhaustion of domestic remedies, the author submits that he cannot appeal to any other French judicial instance, unless and until the Administrative Tribunal of Nancy has adjudicated his case. He therefore submits that he should be deemed to have complied with the requirements of article 5, paragraph 2 (b), of the Optional Protocol.

The complaint

3.1 The author submits that the State party has failed to provide him with an "effective remedy", since the delay in having his case adjudicated would be at least three years. The author claims that this delay is manifestly unreasonable and cannot be justified by the work backlog of the Administrative Tribunal. The author argues that it is incomprehensible that the Administrative Tribunal was able to adjudicate his first case (concerning the 1988 dismissal) within five months, whereas it apparently will take several years to adjudicate his second petition.

3.2 The author further claims that States parties to the Covenant have the duty to provide their tribunals with the necessary means to render justice effectively and expeditiously. According to the author, this is not the case if at least three years pass before a case can be heard at first instance. The author claims that in case of appeal to the Administrative Court of Appeal (Cour administrative d'appel), and subsequently to the Council of State (Conseil d'Etat), a delay of about 10 years could be expected.

3.3 The author further submits that a case which concerns the dismissal of a civil servant is by nature an urgent matter; in this context, he submits that he has not received any salary since 23 March 1989. He claims that a decision reached after three years, even if favourable, would be ineffective. The author moreover argues that, since the Chairman of the Administrative Tribunal has discretionary power to put cases on the roll, he could have granted the author's request, taking into account the particular nature of the case.

The State party's information and observations with regard to the admissibility of the communication

4.1 The State party argues that the communication is inadmissible, on account of the reservation made by the Government of France upon the deposit of the instrument of ratification of the Optional Protocol to the International Covenant on Civil and Political Rights, with respect to article 5, paragraph 2 (a), that the Human Rights Committee "shall not have the competence to consider a communication from an individual if the same matter is being examined or has already been examined under another procedure of international investigation or settlement".

4.2 The State party submits that this reservation is applicable to the present case because the author of the communication has already submitted a complaint to the European Commission of Human Rights, which declared it inadmissible. The State party argues that the fact that the European Commission has not decided on the merits does not preclude the application of the reservation, as the case concerns the same individual, the same facts and the same claim. In this context, the State party refers to the Committee's decision with regard to communication No. 168/1984, a/ where the Committee held that the phrase "'the same matter' refers, with regard to identical parties, to the complaints advanced and facts adduced in support of them".

4.3 The State party further submits that the communication is inadmissible as incompatible ratione materiae with the Covenant. The State party argues that article 14, paragraph 1, of the Covenant is not applicable, since the procedure before the Administrative Tribunal does not involve "rights and obligations in a suit at law". In this context, the State party refers to the decision of the European Commission of Human Rights, which held that the European Convention for the Protection of Human Rights and Fundamental Freedoms does not cover procedures governing the dismissal from employment of civil servants, and points out that the text on which the European Commission based its decision is identical to the text of article 14, paragraph 1, of the Covenant. Moreover, unlike article 6, paragraph 1, of the European Convention, article 14, paragraph 1, of the Covenant does not contain any provision on the right to a judicial decision within a reasonable time.

4.4 The State party further argues that article 2, paragraph 3, of the Covenant, which guarantees an effective remedy to any person whose rights or freedoms as recognized in the Covenant are violated, has not been breached, since the procedure before the Administrative Tribunal can be considered an effective remedy. According to the State party, this is shown by the decision of the Administrative Tribunal, which quashed the author's dismissal in December 1988.

The Committee's decision on admissibility

5.1 At its forty-eighth session, the Committee considered the admissibility of the communication. It noted the State party's contention that the communication was inadmissible because of the reservation made by the State party to article 5, paragraph 2, of the Optional Protocol. The Committee observed that the European Commission had declared the author's application inadmissible as incompatible ratione materiae with the European Convention. The Committee considered that, since the rights of the European Convention differed in substance and with regard to their implementation procedures from the rights set forth in the Covenant, a matter that had been declared inadmissible ratione materiae had not, in the meaning of the reservation, been "considered" in such a way that the Committee was precluded from examining it.

5.2 The Committee recalled that the concept of "suit at law" under article 14, paragraph 1, was based on the nature of the right in question rather than on the status of one of the parties. The Committee considered that a procedure concerning a dismissal from employment constituted the determination of rights and obligations in a suit at law, within the meaning of article 14, paragraph 1, of the Covenant. Accordingly, on 7 July 1993, the Committee declared the communication admissible.

Information received after the decision on admissibility

6.1 By a letter dated 17 June 1994, the author informs the Committee that the Administrative Tribunal of Nancy, on 20 December 1991, ruled in his favour and that he was reinstated in his post. He adds, however, that the city administration, on 17 December 1992, has again unilaterally terminated his employment and that this decision now is again before the administrative tribunals. He further submits that the continuing conflict with the administration and the long delays before the Tribunal have resulted in feelings of anguish and depression, as a result of which his health has seriously deteriorated.

6.2 No information or observations have been forwarded by the State party, despite a reminder sent on 3 May 1994. The Committee notes with regret the absence of cooperation from the State party, and recalls that it is implicit in article 4, paragraph 2, of the Optional Protocol, that a State party should make available to the Committee all the information at its disposal. In the circumstances, due weight must be given to the author's allegations, to the extent that they have been substantiated.

Issues and proceedings before the Committee

7.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

7.2 The Committee notes that the issue before it is whether the duration of the proceedings before the Administrative Tribunal of Nancy concerning the author's second dismissal of 23 March 1989 violated the author's right to a fair hearing within the meaning of article 14, paragraph 1, of the Covenant.

7.3 The Committee recalls that the right to a fair hearing under article 14, paragraph 1, entails a number of requirements, including the condition that the procedure before the courts must be conducted expeditiously. b/ The Committee notes that in the instant case, the author, on 30 March 1989, initiated proceedings against his dismissal before the Administrative Tribunal of Nancy and that the Tribunal, after having concluded the preliminary inquiry on 19 October 1989, rendered its judgement in the case on 20 December 1991.

7.4 The Committee notes that the author obtained a favourable decision from the Administrative Tribunal of Nancy and that he was reinstated in his post. Bearing in mind the fact that the Tribunal did consider whether the author's case should have priority over other cases, the Committee finds that the period of time that has elapsed from the submission of the complaint of irregular dismissal to the decision of reinstatement does not constitute a violation of article 14, paragraph 1, of the Covenant.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it do not reveal a violation of any of the provisions of the Covenant.

[Adopted in English, French and Spanish, the English text being the original version.]

Notes

_a_/ _Official Records of the General Assembly, Fortieth Session, Supplement No. 40_ (A/40/40), annex XIX, _V. Ø v. Norway_, declared inadmissible on 17 July 1985, para. 4.4.

_b_/ See _Official Records of the General Assembly, Forty-fourth Session, Supplement No. 40_ (A/44/40), annex X.E, communication No. 207/1986 (_Yves Morael v. France_), views adopted on 28 July 1989, para. 9.3.

V. Communication No. 445/1991, Lynden Champagnie, Delroy Palmer and Oswald Chisholm v. Jamaica (views adopted on 18 July 1994, fifty-first session)

Submitted by:	Lynden Champagnie, Delroy Palmer and Oswald Chisholm (represented by counsel)
Victims:	The authors
State party:	Jamaica
Date of communication:	28 January 1991
Date of decision on admissibility:	18 March 1993

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 18 July 1994,

Having concluded its consideration of communication No. 445/1991, submitted to the Human Rights Committee on behalf of Messrs. Lynden Champagnie, Delroy Palmer and Oswald Chisholm under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the authors of the communication, their counsel and the State party,

Adopts its views under article 5, paragraph 4, of the Optional Protocol.

1. The authors of the communication are Lynden Champagnie, Delroy Palmer and Oswald Chisholm, three Jamaican citizens currently awaiting execution at St. Catherine District Prison, Jamaica. They claim to be the victims of violations by Jamaica of articles 2, paragraphs 2 and 3 (a) and (b); 6; 7; 10 and 14, paragraph 5, of the International Covenant on Civil and Political Rights. They are represented by counsel. An earlier communication submitted to the Human Rights Committee by the authors, communication No. 257/1987, was declared inadmissible on 26 July 1988 because of non-exhaustion of domestic remedies, since they had not petitioned the Judicial Committee of the Privy Council for special leave to appeal. They resubmitted their communication, arguing that in their case a petition to the Judicial Committee of the Privy Council would not be an effective remedy within the meaning of article 5, paragraph 2 (b), of the Optional Protocol.

The facts as submitted by the authors

2.1 On 8 March 1979, the authors, together with one R. W. and one A. G., were convicted in the Home Circuit Court of Kingston of the murder of one C. M. The authors were sentenced to death; the two other co-accused were sentenced to life imprisonment, as they were minors when the crime was committed.

2.2 The case for the prosecution was that on 9 July 1977 at 3 a.m., C. M. and his common-law wife, H. P., were awakened by noise outside their bedroom window. When C. M. inquired who was disturbing them, someone answered that it was the police. Immediately thereafter H. P. heard a gunshot and saw C. M. falling from the bed; she then hid under the bed. The door to the house was kicked open and five men entered the house. After they discovered H. P., the men asked her for money. She was then taken outside by two of the men, who raped her. C. M. died from the gunshot wounds.

2.3 The authors and R. W. were identified by H. P. at separate identification parades. Supplementary evidence against them included self-incriminating statements, which they made to the police after their arrest. Their defence was mainly based on alleged irregularities during the identification parade and the involuntariness of their statements.

2.4 The authors appealed their convictions; on 10 June 1981, the Jamaican Court of Appeal, treating the applications for leave to appeal as the hearing of the appeal, dismissed the appeal in the cases of the authors and R. W., whereas A. G. was acquitted.

2.5 The Court of Appeal did not issue a written judgement in the case until 17 July 1986, over five years later. The judges admitted that "due to the most unpardonable oversight, the records got filed away and the reasons for judgement were never prepared". Furthermore, they stated that "we cannot, after this lapse of time, rely upon our memory of any impression formed during the hearing of the appeals, and we will therefore confine our reasons to the points which clearly appear from our notes made during the hearing".

2.6 By a letter dated 14 June 1988 concerning the authors' previous communication, a London law firm, which had agreed to represent the authors before the Judicial Committee of the Privy Council, requested the Human Rights Committee to defer consideration of the communication, pending the outcome of the authors' petition for special leave to appeal. However, on 16 July 1990, leading counsel for the case opined that although the summing up of the case by the trial judge was highly questionable and the conduct of the appeal by the Court of Appeal deplorable, there was little point in appealing to the Judicial Committee of the Privy Council, in the light of the narrow interpretation of its jurisdiction by this body. He pointed out that it was difficult to give full advice on the merits of an application for leave to appeal against the decision of the Court of Appeal, as the latter's written judgement had not yet been made available at that time. It appears that after having received the written judgement in October 1990, counsel confirmed that there was no merit in seeking leave to appeal to the Judicial Committee for the following reasons:

(a) Although there were potential grounds for appeal to the Court of Appeal in each of the three cases, many of those grounds had not been raised by counsel in Jamaica. The Privy Council would be most unwilling to allow new grounds to be argued before it for the first time;

(b) Because of the inadequacy of the judgement by the Court of Appeal, the only proper way in which the case could be argued in the Privy Council, even assuming that it would allow new grounds to be argued, was by reference to the 2,000-page transcript of the trial. The Privy Council was unlikely to allow such a course to be adopted;

(c) The Privy Council would most likely be of the opinion that the proper manner of redress for the authors was by way of constitutional motion to challenge the delay in the delivery and the inadequacy of the judgement.

2.7 In the light of the above, counsel submits that the only form of redress currently open to the authors is a constitutional motion to the Supreme (Constitutional) Court of Jamaica, for which the Poor Prisoners' Defence Act does not provide legal aid. Counsel further submits that, as it is virtually impossible to secure the services of qualified lawyers in Jamaica on a pro bono basis for the purpose, a constitutional motion cannot be deemed to be an available remedy.

The complaint

3.1 It is submitted that the authors have been unable to petition the Judicial Committee of the Privy Council for special leave to appeal because of the lack of a reasoned judgement of the Court of Appeal, in violation of article 2, paragraphs 2 and 3 (a) and (b), *juncto* article 14, paragraph 5, of the Covenant.

3.2 Counsel further submits that an execution of the authors at this point in time, after more than 15 years on death row, would amount to an arbitrary deprivation of life, in violation of article 6 of the Covenant. Similarly, the fact that the authors were kept on death row for six years (from 1981 to 1987, when they initially submitted their communication to the Committee), during which there was no legal impediment to their execution, constitutes cruel, inhuman and degrading treatment within the meaning of article 7 of the Covenant.

3.3 Finally, counsel submits that the conditions of detention on death row amount to a violation of article 10 of the Covenant. In support of his contention, he submits a copy of a report on conditions of detention in Jamaican penitentiaries, prepared by a non-governmental organization.

The State party's information and observations on the question of admissibility

4.1 In its submission under rule 91, the State party argues that the communication is inadmissible under article 5, paragraph 2 (b), of the Optional Protocol, because the authors have failed to exhaust domestic remedies. It notes that the authors may still appeal to the Judicial Committee of the Privy Council by way of petition for special leave to appeal and that legal aid would be available to them under the Poor Prisoners' Defence Act for that purpose. The State party adds that the authors may still apply for constitutional redress; in this context, it notes that the rights invoked by the authors are co-terminous with the provisions of chapter III of the Jamaican Constitution, which guarantees and protects fundamental rights and freedoms to all persons in Jamaica. Pursuant to section 25 of the Constitution, an individual claiming that any of these provisions has been, is being or is likely to be contravened in relation to him, may apply to the Supreme (Constitutional) Court for redress. A right of appeal lies to the Court of Appeal and subsequently to the Privy Council.

4.2 With respect to the question of availability of legal aid, the State party submits that the Poor Prisoners' Defence Act does not make provision for legal aid in respect of constitutional motions, and that there is no obligation for States parties to the Covenant to provide legal aid in respect of matters other than criminal matters. It is submitted that nothing in the Optional Protocol or in customary international law would support the contention that a person is relieved of the obligation to exhaust local remedies because of his indigence.

The Committee's decision on admissibility

5.1 At its forty-seventh session, the Committee considered the admissibility of the communication. In respect of the State party's contention that the communication was inadmissible because of non-exhaustion of domestic remedies, the Committee recalled its constant jurisprudence that for purposes of article 5, paragraph 2 (b), of the Optional Protocol, domestic remedies must be both effective and available, and that an element of timeliness both in the pursuit and in the adjudication of such remedies must be observed. With respect to the authors' possibility to petition the Judicial Committee of the Privy Council for special leave to appeal, the Committee noted counsel's advice that such a petition would have little prospect of success. Moreover, the Committee noted that on 11 July 1988, the Judicial Committee of the Privy Council decided in another case a/ that it had no competence to hear an application relating to delay in judicial procedure. In the circumstances of the case before it, where the sole issue raised by the authors under article 14 was one of delay, the Committee considered that the petition for special leave to appeal to the Privy Council could not be considered an effective remedy within the meaning of article 5, paragraph 2 (b), of the Optional Protocol.

5.2 With respect to the authors' possibility of filing a constitutional motion, the Committee considered that in the absence of legal aid, a constitutional motion did not constitute an available remedy in the case. In the light of the above, the Committee found that it was not precluded by article 5, paragraph 2 (b), of the Optional Protocol, from considering the communication.

5.3 The Committee considered, however, that the authors had failed to substantiate, for purposes of admissibility, their claim under article 7. Similarly, the Committee considered that the authors, by merely referring to a report outlining the conditions of detention in Jamaican prisons, had failed to substantiate, for purposes of admissibility, the allegation that they were the victims of a violation of article 10 of the Covenant. In this respect, the Committee found that the authors had no claim within the meaning of article 2 of the Optional Protocol.

5.4 On 18 March 1993, the Committee declared the communication admissible in so far as it appeared to raise issues under article 14, paragraphs 3 (c) and 5, *juncto* article 6 of the Covenant.

Examination of the merits

6. The State party did not reply to the Committee's request under article 4, paragraph 2, of the Optional Protocol, to submit to it written explanations or statements clarifying the matter and the remedy, if any, that may have been taken in the case.

7.1 The Committee has considered the communication in light of all the information made available to it by the parties, as required under article 5, paragraph 1, of the Optional Protocol. The Committee notes with concern that the State party has not addressed the substance of the matter under consideration. Article 4, paragraph 2, of the Optional Protocol enjoins the State party to investigate, in good faith and within the imparted deadlines, all the allegations of violations of the Covenant made against it and against its judicial authorities, and to make available to the Committee all the information at its disposal.

7.2 The question before the Committee is whether the delay in the issuing and the inadequacy of the written judgement of the Court of Appeal of Jamaica deprived the authors of their right, under article 14, paragraph 3 (c), to be tried without undue delay, and of their right, under article 14, paragraph 5, to have conviction and sentence reviewed by a higher tribunal according to law. The Committee recalls that article 14, paragraph 3 (c), and article 14, paragraph 5, must be read together; the right to review of conviction and sentence must be made available without delay. b/ In this connection, the

Committee refers to its earlier jurisprudence c/ and reaffirms that under article 14, paragraph 5, a convicted person is entitled to have, within a reasonable time, access to written judgements, duly reasoned, for all instances of appeal in order to enjoy the effective exercise of the right to have conviction and sentence reviewed by a higher tribunal according to law.

7.3 As regards the case before it, the Committee notes that the Court of Appeal dismissed the authors' appeal on 10 June 1981, but did not issue a written judgement until 17 July 1986, i.e. over five years later. Furthermore, it appears from the information before the Committee, which has remained uncontested, that it took another four years before the written judgement was made available to leading counsel in London, who was only then able to give his opinion on the merits of a petition for special leave to appeal to the Judicial Committee of the Privy Council. The Committee has also noted that because of the considerable lapse of time between the hearing of the appeal and delivery of the reasons for judgement, the Court of Appeal was unable to rely on its memory of the hearing of the appeal and had to confine its reasons to such notes as were made during the hearing of the appeal. In the circumstances, the Committee finds that it cannot be said that the authors benefited from a proper review of their conviction and sentence, nor from timely access to the reasons for judgement, which would have enabled them to exercise effectively their right of appeal at all instances. The Committee therefore concludes that the rights of the authors under article 14, paragraphs 3 (c) and 5, of the Covenant, have been violated.

7.4 The Committee is of the opinion that the imposition of a sentence of death upon conclusion of a trial in which the provisions of the Covenant have not been respected constitutes, if no further appeal against the sentence is possible, a violation of article 6 of the Covenant. As the Committee noted in its general comment 6(16), the provision that a sentence of death may be imposed only in accordance with the law and not contrary to the provisions of the Covenant implies that "the procedural guarantees therein prescribed must be observed, including the right to a fair hearing by an independent tribunal, the presumption of innocence, the minimum guarantees for the defence, and the right to review by a higher tribunal". d/ In the present case, since the final sentence of death was passed without due respect for the requirements for a fair trial set out in article 14, paragraphs 3 (c) and 5, there has accordingly also been a violation of article 6 of the Covenant.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of article 14, paragraphs 3 (c) and 5, and consequently of article 6 of the International Covenant on Civil and Political Rights.

9. In capital punishment cases, the obligation of States parties to observe rigorously all the guarantees for a fair trial set out in article 14 of the Covenant admits of no exception. The failure to provide Messrs. Champagnie, Palmer and Chisholm with an effective right to appeal without undue delay in accordance with article 14, paragraphs 3 (c) and 5, of the Covenant, means that they did not receive a fair trial within the meaning of the Covenant. Consequently, they are entitled, under article 2, paragraph 3 (a), of the Covenant, to an effective remedy. The Committee is of the view that in the circumstances of the case, this entails their release. The State party is under an obligation to ensure that similar violations do not occur in the future.

10. The Committee would wish to receive information, within 90 days, on any relevant measures taken by the State party in respect of the Committee's views.

[Adopted in English, French and Spanish, the English text being the original version.]

Notes

a/ The case of Howard Martin was subsequently submitted to the Committee as communication No. 317/1988 (see Official Records of the General Assembly, Forty-eighth Session, Supplement No. 40 (A/48/40), annex XII.J, views adopted on 24 March 1993).

b/ See Official Records of the General Assembly, Forty-fourth Session, Supplement No. 40 (A/44/40), annex X.F, communications Nos. 210/1986 and 225/1987 (Earl Pratt and Ivan Morgan v. Jamaica), views adopted on 6 April 1989, paras. 13.3-13.5.

c/ Ibid., Forty-seventh Session, Supplement No. 40 (A/47/40), annexes IX.B and J, communications Nos. 230/1987 (Raphael Henry v. Jamaica) and 283/1988 (Aston Little v. Jamaica), views adopted on 1 November 1991; and ibid., Forty-eighth Session, Supplement No. 40 (A/48/40), annex XII.K, communication No. 320/1988 (Victor Francis v. Jamaica), views adopted on 24 March 1993.

d/ Ibid., Thirty-seventh Session, Supplement No. 40 (A/37/40), annex V, general comment 6 (16), para. 7.

W. Communication No. 449/1991, Barbarín Mojica v. the Dominican Republic (views adopted on 15 July 1994, fifty-first session)

Submitted by:	Barbarín Mojica
Victim:	His son, Rafael Mojica
State party:	Dominican Republic
Date of communication:	22 July 1990
Date of decision on admissibility:	18 March 1993

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 15 July 1994,

Having concluded its consideration of communication No. 449/1991, submitted to the Human Rights Committee by Mr. Barbarín Mojica on behalf of his son, Rafael Mojica, under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts its views under article 5, paragraph 4, of the Optional Protocol.

1. The author of the communication is Barbarín Mojica, a citizen of the Dominican Republic and labour leader residing in Santo Domingo, Dominican Republic. He submits the communication on behalf of his son Rafael Mojica, a Dominican citizen born in 1959, who disappeared in May 1990. The author claims violations by the State party of articles 6, 7, 9, paragraph 1, and 10, paragraph 1, of the Covenant in respect of his son.

The facts as submitted by the author

2.1 The author is a well-known labour leader. His son, Rafael Mojica, a dock worker in the port of Santo Domingo, was last seen by his family in the evening of 5 May 1990. Between 8 p.m. and 1 a.m., he was seen by others at the restaurant "El Aplauso" in the neighbourhood of the Arrimo Portuario union, with which he was associated. Witnesses affirm that he then boarded a taxi in which other, unidentified, men were travelling.

2.2 The author contends that during the weeks prior to his son's disappearance, Rafael Mojica had received death threats from some military officers of the Dirección de Bienes Nacionales, in particular from Captain Manuel de Jesus Morel and two of the latter's assistants, known under their sobriquets of "Martin" and "Brinquito". They allegedly threatened him because of his presumed communist inclinations.

2.3 On 31 May 1990, the author and his family and friends requested the opening of an investigation into the disappearance of Rafael Mojica. The Dominican representative of the American Association of Jurists wrote a letter to this effect to President Balaguer; apparently, the author did not receive a reply. One month after Rafael Mojica's disappearance, two decapitated and mutilated bodies were found in another part of the capital, close to the industrial zone of Haina and the beach of Haina. Fearing that one of the bodies might be that of his son, the author requested an autopsy, which was performed on 22 June 1990. While the autopsy could not establish the identity of the victims, it was certain that Rafael Mojica was not one of them, as his skin, unlike that of the victims, was dark ("no se trata del Sr. Rafael Mojica Melenciano, ya que éste según sus familiares es de tez oscura"). On 6 July 1990, the Office of the Procurator General released a copy of the autopsy report to the author.

2.4 On 16 July 1990, the author, through a lawyer, requested the Principal Public Prosecutor in Santo Domingo to investigate the presumed involvement of Captain Morel and his assistants in the disappearance of his son. The author does not specify whether the request received any follow-up between 23 July 1990, the date of the communication to the Human Rights Committee, and the beginning of 1994.

2.5 The author contends that under the law of the Dominican Republic, no specific remedies are available in cases of enforced or involuntary disappearances of persons.

The complaint

3. It is submitted that the above facts reveal violations by the State party of articles 6, 7, 9, paragraph 1, and 10, paragraph 1, of the Covenant.

The Committee's decision on admissibility

4.1 During its forty-seventh session, the Committee considered the admissibility of the communication. It noted with concern the absence of cooperation on the part of the State party and observed that the author's contention that there were no effective domestic remedies to exhaust for cases of disappearances of individuals had remained uncontested. In the circumstances, the Committee was satisfied that the requirements of article 5, paragraph 2 (b), of the Optional Protocol had been met.

4.2 As to the author's claim under article 10, paragraph 1, of the Covenant, the Committee considered that it had not been substantiated and that it related to what might hypothetically have happened to Rafael Mojica after his disappearance on 5 May 1990; the Committee thus concluded that in this respect, the author had no claim under article 2 of the Optional Protocol.

4.3 Concerning the author's claims under articles 6, 7 and 9, paragraph 1, the Committee considered them to be substantiated, for purposes of admissibility. On 18 March 1993, therefore, the Committee declared the communication admissible in so far as it appeared to raise issues under articles 6, 7 and 9 of the Covenant. The State party was requested, in particular, to provide information about the results of the investigation into Mr. Mojica's disappearance and to forward copies of all relevant documentation in the case.

Examination of the merits

5.1 The State party's deadline under article 4, paragraph 2, of the Optional Protocol expired on 10 November 1993. No submission on the merits has been received from the State party, in spite of a reminder addressed to it on 2 May 1994.

5.2 The Committee has noted with regret and concern the absence of cooperation on the part of the State party in respect of both the admissibility and the merits of the communication. It is implicit in article 4, paragraph 2, of the Optional Protocol and in rule 91 of the rules of procedure that a State party should investigate thoroughly, in good faith and within the imparted deadlines, all the allegations of violations of the Covenant made against it and make available to the Committee all the information at its disposal. This the State party has failed to do. Accordingly, due weight must be given to the author's allegations, to the extent that they have been substantiated.

5.3 The author has alleged a violation of article 9, paragraph 1, of the Covenant. Although there is no evidence that Rafael Mojica was actually arrested or detained on or after 5 May 1990, the Committee recalls that under the terms of the decision on admissibility, the State party was requested to clarify these issues; it has not done so. The Committee further notes the allegation that Rafael Mojica had received death threats from some military officers of the Dirección de Bienes Nacionales in the weeks prior to his disappearance; this information, again, has not been refuted by the State party.

5.4 The first sentence of article 9, paragraph 1, guarantees to everyone the right to liberty and security of person. In its prior jurisprudence, the Committee has held that this right may be invoked not only in the context of arrest and detention, and that an interpretation which would allow States parties to tolerate, condone or ignore threats made by persons in authority to the personal liberty and security of non-detained individuals within the State party's jurisdiction would render ineffective the guarantees of the Covenant. a/ In the circumstances of the case, the Committee concludes that the State party has failed to ensure Rafael Mojica's right to liberty and security of the person, in violation of article 9, paragraph 1, of the Covenant.

5.5 In respect of the alleged violation of article 6, paragraph 1, the Committee recalls its general comment 6 (16) on article 6, in which it is stated, inter alia, that States parties should take specific and effective measures to prevent the disappearance of individuals and establish effective facilities and procedures to investigate thoroughly, by an appropriate impartial body, cases of missing and disappeared persons in circumstances that may involve a violation of the right to life.

5.6 The Committee observes that the State party has not denied that Rafael Mojica (a) has in fact disappeared and remains unaccounted for since the evening of 5 May 1990, and (b) that his disappearance was caused by individuals belonging to the Government's security forces. In the circumstances, the Committee finds that the right to life enshrined in article 6 has not been effectively protected by the Dominican Republic, especially considering that this is a case where the victim's life had previously been threatened by military officers.

5.7 The circumstances surrounding Rafael Mojica's disappearance, including the threats made against him, give rise to a strong inference that he was tortured or subjected to cruel and inhuman treatment. Nothing has been submitted to the Committee by the State party to dispel or counter this inference. Aware of the nature of enforced or involuntary disappearances in many countries, the Committee feels confident in concluding that the disappearance of persons is inseparably linked to treatment that amounts to a violation of article 7.

6. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights,

is of the view that the facts as found by the Committee reveal a violation by the State party of articles 6, paragraph 1; 7; and 9, paragraph 1, of the Covenant.

7. Under article 2, paragraph 3, of the Covenant, the State party is under an obligation to provide the author with an effective remedy. The Committee urges the State party to investigate thoroughly the disappearance of Rafael Mojica, to bring to justice those responsible for his disappearance and to pay appropriate compensation to his family.

8. The Committee would wish to receive from the State party, within 90 days, information about the measures taken in response to its views.

[Adopted in English, French and Spanish, the English text being the original version.]

Notes

a/ See Official Records of the General Assembly, Forty-sixth Session, Supplement No. 40 (A/46/40), annex IX.D, communication No. 195/1985 (Delgado Páez v. Colombia), views adopted on 12 July 1990, paras. 5.5 and 5.6; ibid., Forty-eighth Session, Supplement No. 40 (A/48/40), annex XII.I, communication No. 314/1988 (Bwalya v. Zambia), views adopted on 14 July 1993, para. 6.4; and annex IX.BB below, communication No. 468/1991 (Oló Bahamonde v. Equatorial Guinea), views adopted on 20 October 1993, para. 9.2.

X. Communication No. 451/1991, Barry Stephen Harward v. Norway (views adopted on 15 July 1994, fifty-first session)

Submitted by:	Barry Stephen Harward (represented by counsel)
Victim:	The author
State party:	Norway
Date of communication:	17 September 1990 (initial submission)
Date of decision on admissibility:	26 July 1993

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 15 July 1994,

Having concluded its consideration of communication No. 451/1991, submitted to the Human Rights Committee by Mr. Barry Stephen Harward under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, his counsel and the State party,

Adopts its views under article 5, paragraph 4, of the Optional Protocol.

1. The author of the communication (dated 17 September 1990) is Barry Stephen Harward, a British citizen, at the time of the submission of the communication imprisoned in Norway. He claims to be a victim of a violation by Norway of article 14, paragraphs 2, 3 (a), (b), (e) and (g), 5 and 6 of the International Covenant on Civil and Political Rights. He is represented by counsel.

The facts as submitted by the author

2.1 The author states that he was arrested on 27 September 1986 in Tenerife, Spain, and informed that his extradition had been requested on suspicion of drug trafficking. He was kept in detention until his extradition on 21 August 1987 to Norway. He submits that, at that time, he was still waiting for the outcome of the appeal against his extradition, which he had filed with the Spanish Constitutional Court.

2.2 In Norway, the author was charged with having imported a considerable quantity of heroin into the country during 1985 and 1986. A legal aid lawyer, who spoke little English, was appointed. On 31 August 1987, a formal indictment was issued against him and his co-defendants, including his two brothers.

2.3 The trial started on 12 October 1987, in the Eidsivating High Court. On 3 November 1987, the author and his co-defendants were found guilty as charged; the author, who claims to be innocent, was sentenced to 10 years' imprisonment. On 25 March 1988, the Supreme Court rejected the author's appeal.

The complaint

3.1 The author claims that he was denied a fair trial, that the charges against him were fabricated and that the evidence against him was contradictory and uncorroborated.

3.2 More specifically, the author claims to be a victim of a violation of article 14, paragraph 2, of the Covenant, because of the massive prejudicial media coverage, which allegedly influenced witnesses and jury members. According to the author, information about the accused and the charges was leaked to the press by police officers.

3.3 The author further claims to be a victim of a violation of article 14, paragraph 3 (a), of the Covenant, since he was allegedly misinformed about the charges against him in Spain. He further submits that the 1,100 document pages used in the trial against him were in Norwegian, which he did not understand; only the indictment and a small proportion of the other papers were translated.

3.4 The author also claims that article 14, paragraph 3 (b), was violated in his case. He claims that he was hindered in the preparation of his defence because the indictment was issued only six weeks before the start of the trial, and his lawyer's request to have all documents pertaining to the case translated was refused. He further alleges that his defence was obstructed, since the most damaging evidence against him was only introduced during the trial, and not included in the documents which were available beforehand. According to the author, this evidence consisted of uncorroborated and unsigned statements made by his co-defendants during their detention in solitary confinement, in the absence of an interpreter or lawyer.

3.5 The author further claims that his request to call his Spanish lawyer as a witness was refused, although she could have given evidence relating to his allegedly unlawful extradition. He further claims that he was not allowed to cross-examine his co-defendant Mette Westgård, whose evidence was used against him. He alleges that the statement she had made to the police was read out in court, but that she, although she was present, was not called to testify and could therefore not be cross-examined. The author submits that the defence for all six accused only called one witness. According to the author, these facts amount to a violation of article 14, paragraph 3 (e), of the Covenant.

3.6 The author also claims to be a victim of a violation by Norway of article 14, paragraph 3 (g), as he was allegedly told by the police that if he refused to plead guilty, he would be sentenced to 21 years' imprisonment.

3.7 Finally, the author submits that under Norwegian law, he could not appeal his conviction, but only his sentence, to the Supreme Court. He claims that this constitutes a violation of article 14, paragraphs 5 and 6, of the Covenant.

The State party's observations and the author's comments thereon

4.1 The State party, in its submission under rule 91, provides information about the relevant domestic law and argues that the communication is inadmissible.

4.2 As regards the author's claim under article 14, paragraph 5, the State party observes that it made a reservation in relation to this paragraph when ratifying the Covenant, and argues that this part of the communication should therefore be declared inadmissible.

4.3 In respect of the author's claim under article 14, paragraph 2, that the jury was prejudiced against him, the State party argues that the author or his counsel could have brought objections concerning the impartiality of the jury members to the court's attention, and could have demanded their exclusion. As regards the author's allegations that the police leaked confidential information to the media, the State party argues that these allegations were never brought to the attention of the competent police authorities for investigation and possible punishment of the responsible officers. The State party therefore claims that this part of the communication is inadmissible on the ground of non-exhaustion of domestic remedies.

4.4 As regards the author's claim under article 14, paragraph 3 (a), that he was wrongly informed about the charges against him when being arrested in Spain, the State party submits that it provided the proper information to the Spanish authorities when requesting the author's extradition in October 1986 pursuant to the European Convention on Extradition. It states that it cannot be held responsible for mistakes made by those authorities in the communication of this information. Moreover, the State party argues that the documents of the case do not support the author's claim.

4.5 In respect of the author's other allegation under article 14, paragraph 3 (a), that he was not informed of the charges against him in a language that he could understand, the State party submits that the author was immediately informed of the charges against him upon his arrival in Norway on 21 August 1987; an interpreter was present on that occasion. The next day, during the court hearing on custody, he was once more informed about the charges, also in the presence of an interpreter. The State party therefore argues that this part of the communication is inadmissible because the facts do not raise any issue under the Covenant.

4.6 As regards the author's claim that he did not have enough time and facilities for the preparation of his defence, the State party notes that neither the author nor his counsel ever requested a postponement of the trial. It therefore argues that in this respect, domestic remedies have not been exhausted.

4.7 With regard to the author's claim that the refusal of the Prosecution to have all documents pertaining to his case translated constitutes a violation of article 14, paragraph 3 (b), the State party submits that all documents in the case were available to the defence as from 27 August 1987. The State party argues that the Covenant does not provide an absolute right to have all documents in a criminal case translated. It submits that the most relevant documents, such as the indictment, the court records and important statements made by the accused to the police, were indeed translated, that all documents were available to counsel, and that counsel had the opportunity to use the services of an interpreter in his consultations with the defendant. It further submits that the author's counsel was informed by the Prosecution that he could demand the translation of specific documents which he deemed important, but that he failed to do this. According to the State party, this part of the communication is therefore likewise inadmissible on the ground of incompatibility with the Covenant and non-exhaustion of domestic remedies.

4.8 As regards the author's allegation that he was prevented from cross-examining one of his co-defendants, whose statement was read out in court, the State party observes that the Covenant does not prohibit the reading out of police reports in court. Moreover, it submits that article 14, paragraph 3 (e), applies to the right of cross-examination of witnesses who are not themselves defendants in a case. In this context, the State party points out that under Norwegian law, a defendant does not have to give any affirmation and is not criminally liable for giving a false statement. The State party further observes that, upon request from counsel, the co-defendant in question was not asked to continue her testimony, following the advice of a medical doctor. The State party argues that the reading of the evidence did not violate the author's right to a fair trial, and that this part of the communication therefore does not raise any issue under the Covenant.

4.9 In respect of the author's claim that he was not allowed to call his Spanish lawyer as a defence witness, the State party points out that the author wanted her to submit evidence about his extradition, which would have been irrelevant to the case on trial. It therefore argues that this part of the communication is inadmissible as being incompatible with the Covenant. Furthermore, the State party argues that the author could have appealed the refusal to call a witness to the Supreme Court, which he did not do. This part of the communication should therefore also be declared inadmissible on the ground of non-exhaustion of domestic remedies.

4.10 In this connection, the State party submits that on 19 October 1987, the author declared that he had no confidence in the court, that he no longer wanted to be represented and that he did not want any witnesses called.

4.11 As regards the author's claim under article 14, paragraph 3 (g), the State party argues that this claim is not substantiated and should therefore be declared inadmissible. Moreover, domestic remedies have not been exhausted in this respect.

4.12 As regards the author's claim under article 14, paragraph 6, the State party argues that this provision does not apply to the facts of the present case, and that this part of the communication should therefore be declared inadmissible.

5.1 In his comments on the State party's submission, counsel argues that, as regards the partiality of the jury, there is no real possibility in Norway to change the composition of the jury in a criminal trial before the High Court. He submits that normally not more than two jury members can be challenged by the defence. He moreover argues that pursuant to article 14, paragraph 2, the presumptio innocentiae should be respected not only by judges, but also by other public authorities. Counsel argues that in this case, the police clearly broke this obligation by leaking information to the press, and he submits that in doing so, the police did not break domestic law, since the police regulations are very liberal in this respect. Therefore, no effective domestic remedies are said to exist.

5.2 With regard to the claim under article 14, paragraph 3 (b), counsel argues that no request for the postponement of the trial had been made because of the length of time the accused had already spent in custody. He further claims that the accused raised the issue of the translation of documents in court, but that the judges paid no attention to it. It was further raised during appeal, but the Supreme Court found no violation of article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Counsel therefore argues that domestic remedies have been exhausted.

5.3 As regards the claim under article 14, paragraph 3 (e), counsel concedes that there are differences between statements from witnesses and those from defendants. He points out, however, that the statement of Mette Westgård was particularly damaging for the author and was allegedly made under duress, while she was held in solitary confinement. He therefore argues that an opportunity to cross-examine her evidence should have been given. As regards the request to call the author's Spanish lawyer as witness for the defence, it is stated that her testimony could have clarified the circumstances of the author's extradition.

The Committee's decision on admissibility

6.1 During its forty-eighth session, the Committee considered the admissibility of the communication. The Committee found that it was precluded from considering the author's claim under article 14, paragraph 5, of the Covenant, because of the reservation that the State party had made upon ratification of the Covenant with regard to this provision. It further considered that the author had failed to exhaust domestic remedies with respect to his claims under article 14, paragraphs 2 and 3 (d), as well as with regard to his claim that he was not allowed to call a certain witness. The Committee also considered that the author had failed to substantiate, for purposes of admissibility, his claims under article 14, paragraphs 3 (a) and 3 (g), as well as his claim that the failure to allow the cross-examination of his co-defendant infringed the equality of arms between the prosecution and the defence in the examination of witnesses, as protected by article 14, paragraph 3 (e). The Committee considered that the author's claim under article 14, paragraph 6, was incompatible with the provisions of the Covenant.

6.2 As regards the author's claim that the State party's failure to provide translation of all the documents pertaining to his case hindered his defence, the Committee noted that the author had raised this issue before the Supreme Court and that accordingly domestic remedies had been exhausted for the purposes of article 5, paragraph 2 (b), of the Optional Protocol. The Committee further noted that the author was defended by a legal aid lawyer and apparently had no independent means to have the documents translated. The Committee was of the opinion that the question of whether a State party in those circumstances is under an obligation to provide translations of all documents in a criminal case, and whether the State party has a free choice in determining which documents to make available in translation, might raise issues under article 14, paragraphs 1 and 3 (b). On 26 July 1993, therefore, the Committee declared the communication admissible in respect of that question.

The State party's submission on the merits and the author's comments thereon

7.1 By submission of 28 February 1994, the State party explains that the defence counsel was chosen by the author himself and that, if he were unsatisfied with his performance or with his knowledge of the English language, he could have asked to have another counsel appointed. Moreover, an interpreter, remunerated by the State, was available for all meetings between counsel and his client. In this connection, the State party explains that under its legal aid system, all accused persons in custody are entitled to a lawyer paid by the State, regardless of their financial situation. The accused may choose any lawyer who is willing to represent him.

7.2 As regards the more than 1,100 pages in the case file, the State party submits that these are documents that were collected and used by the police and prosecuting authorities for the purpose of investigation. "The document file in a criminal case is not given to the jurors. If any of the documents are to be presented during the trial as written evidence, they must be read aloud". According to the court record, 15 documents were presented by the prosecution in the case against the author, including five letters from the author, which were originally in English. The State party submits that of the Norwegian documents presented by the prosecution during the trial, only four reports concerning confiscations and analyses were not available in English translation.

7.3 The State party notes that the Committee, in its decision on admissibility, concluded from the fact that a legal aid lawyer was appointed that the author apparently did not have independent means to have the documents in his case file translated. Referring to its explanation about the legal aid system (see para. 7.1), the State party argues that it is not clear whether or not the author did possess independent financial means and that it is not known to the Government of Norway whether he could have afforded to hire a translator at his own expense.

7.4 As to the application of the Covenant to the facts of the instant case, the State party refers to its submission with regard to the admissibility of the communication and reiterates its argument that it would be beyond the purpose of article 14, paragraph 3 (b), of the Covenant to require that all the documents in a criminal case should be translated. In this context, the State party refers to a decision by the European Court of Human Rights. a/ It argues that the purpose of article 14 is to ensure that the accused has a real opportunity to defend himself, and that the whole situation of the accused must be taken into account when establishing to what extent the translation of all case documents is necessary. In this context, the State party reiterates that author's counsel had access to all case documents and that interpreters were available at all times.

7.5 The State party further questions, in view of the fact that translation of all documents in a case file would be extremely time-consuming, the compatibility of such translation with the requirement of article 14, paragraph 3 (c), of the Covenant, that an accused be tried without undue delay. Such delay would be aggravated by the fact that the accused would remain in custody for the length of that period, since most cases involving defendants who do not understand Norwegian relate to serious crimes, like drug trafficking, and a danger exists that they would leave the country when released pending trial.

7.6 The prosecution instructions provide that "case documents shall be translated at public expense to the extent seen as necessary in order to safeguard the accused's interest in the case". The rules were drafted in 1984, after consultation with the Bar Association, which was of the opinion that it was unnecessary to have all documents in a case file translated. The State party further points out that translation of all documents in a case would lead to great financial and practical problems and that therefore careful consideration must be given to whether such translation is really necessary for purposes of fair trial.

7.7 As to the particular circumstances of the author's case, the State party argues that the failure to provide translation of all documents in the case did not violate the author's right to a fair trial. In this connection, the State party recalls that the author's defence counsel had access to all documents in the author's file, and that an interpreter could be used at all meetings between author and counsel. It further recalls that many of the case documents were irrelevant to the author's defence and of little relevance to the court trial. It furthermore argues that a translation of all documents would considerably have prolonged the pre-trial detention of the author and his co-defendants.

7.8 In the author's case, written translations were provided of the indictment, the court records and important statements made by his co-defendants during the investigation. Moreover, some of the documents were originally written in English. The State party submits that if the author or his counsel thought it necessary to have more documents translated, they should have specified the documents and requested their translation. Defence counsel was informed of this possibility by the prosecutors in the case. If such a request had been rejected, counsel could have appealed to the higher prosecuting authority and finally to Court. According to the case documents, neither the author nor his defence counsel ever specified the documents of which they sought translation.

7.9 In a further submission dated 15 March 1994, the State party furnishes a copy of a decision of the European Commission of Human Rights dated 12 March 1990, in respect of an application of the author's brother. The Commission found that Mr. Harward's complaint that the failure to provide written translations of all documents in his case file was in violation of article 6, paragraph 3 (b), of the European Convention for the Protection of Human Rights and Fundamental Freedoms b/ was manifestly ill-founded. The Commission considered that a system whereby the right to inspect the file is restricted to the defendant's lawyer is not in itself incompatible with article 6, paragraph 3, of the Convention.

8.1 In his comments on the State party's submission, author's counsel recalls the serious nature of the charges against the author and of the sentences he was facing. He emphasizes that the police investigation was extensive, covering several countries and lasting for more than a year. During that time the author was kept imprisoned in Spain, awaiting extradition, without being informed in detail about the charges against him. Only after he had arrived in Norway and counsel had been appointed for him, at the end of August 1987, did he learn that the case file against him consisted of more than 1,100 pages of documents. He did not ask for an adjournment of the trial, however, because of the length of time he and his co-defendants had already spent in detention.

8.2 Counsel argues that it is irrelevant that the case file was not given to the jurors and that only some of the documents were used in the trial. He emphasizes that all of the 1,100 pages were available to and used by the police and the prosecution in the preparation of the trial, whereas they were not available to the author in translation. Moreover, counsel points out that a letter written by the author's counsel to the Court shows that although he had access to the whole file, on 12 October 1987, the day the trial started, he still had not received copies of all documents he had asked for.

8.3 Counsel further argues that counsel of the author's brothers, who faced almost identical charges, had tried for a long time, before the author arrived in Norway, to obtain translations of the documents they needed for the defence. Defence counsel for the author, after he had been assigned, worked closely with defence counsel for the brothers. Counsel for the brothers had demanded, but not obtained, a complete translation of all the documents, on the grounds that it "would be absolutely impossible to give the client a complete picture of this case, with its mass of details, to give him the possibility to, if desired, control alibies, inter alia, without the client having the necessary time to go through the case documents". Counsel argues that the documents that were translated, such as the statements given to the police in Norway, were insufficient; he mentions that, among others, statements given to the police in Sweden, statements given by witnesses and police reports, although used as evidence, were not provided in written translation. It is argued that by failing to provide the author with a translation of all documents, the State party placed the author in a worse position than a Norwegian facing a similar charge, who can have access to the documents in his case in a language he understands.

8.4 In this context, counsel points out that defence counsel for the author's brother considered withdrawing from the case, since he considered that the failure to obtain the documents in translation seriously hindered him in preparing the defence. In the end, he did not step down, since his client, who had been in custody for more than one year and a half, did not want to prolong the trial proceedings. It is submitted that both the author and his brother refused to give a statement in court because they considered that they had not had the opportunity to repudiate the charges against them.

8.5 As regards the decision of the European Commission in the case of the author's brother, counsel notes that the Commission found that the brother, who had been in detention in Norway for over a year, had, through his defence counsel, every opportunity to familiarize himself with the documents in the case file. He argues that the author's case differs from his brother's on this point, since the author could only start preparing his defence after his arrival in Norway in August 1987, whereas the trial against him started on 12 October 1987.

Issues and proceedings before the Committee

9.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

9.2 The Committee notes that the facts, to which the parties agree, show that Mr. Harward was assigned a lawyer on 28 August 1987 and that the trial against him started on 12 October 1987, that the indictment, the statements of co-defendants to the Norwegian police and the court records were provided in written translation to the author, and that the author's defence counsel had access to the entire case file. It is also undisputed that an interpreter was available to the defence for all meetings between counsel and Mr. Harward and that simultaneous interpretation was provided during the court hearings.

9.3 The Committee further notes that the State party has argued that not all documents in the case file were of relevance to the defence, and that only 15 documents were presented by the prosecution in Court and were therefore available to the jurors, out of which only four police reports were not available in English or in English translation. The Committee has also taken note of counsel's argument that all documents in the case file, although not presented during the trial, were of relevance to the defence, since they had been used by the police and the prosecution in their preparation of the trial.

9.4 Article 14 of the Covenant protects the right to a fair trial. An essential element of this right is that an accused must have adequate time and facilities to prepare his defence, as is reflected in paragraph 3 (b) of article 14. Article 14, however, does not contain an explicit right of an accused to have direct access to all documents used in the preparation of the trial against him in a language he can understand. The question before the Committee is whether, in the specific circumstances of the author's case, the failure of the State party to provide written translations of all the documents used in the preparation of the trial has violated Mr. Harward's right to a fair trial, more specifically his right under article 14, paragraph 3 (b), to have adequate facilities to prepare his defence.

9.5 In the opinion of the Committee, it is important for the guarantee of a fair trial that the defence have the opportunity to familiarize itself with the documentary evidence against an accused. However, this does not signify that an accused who does not understand the language used in court has the right to be furnished with translations of all relevant documents in a criminal investigation, provided that the relevant documents are made available to his counsel. The Committee notes that Mr. Harward was represented by a Norwegian lawyer of his choice, who had access to the entire file, and that the lawyer had the assistance of an interpreter in his meetings with Mr. Harward. Defence counsel therefore had opportunity to familiarize himself with the file and, if he thought it necessary, to read out Norwegian documents to Mr. Harward during their meetings, so that Mr. Harward could take note of their contents through interpretation. If counsel would have deemed the time available to prepare the defence (just over six weeks) inadequate to familiarize himself with the entire file, he could have requested a postponement of the trial, which he did not do. The Committee concludes that in the particular circumstances of the case, Mr. Harward's right to a fair trial, more specifically his right to have adequate facilities to prepare his defence, was not violated.

9.6 The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it do not reveal a violation of any of the articles of the Covenant.

[Adopted in English, French and Spanish, the English text being the original version.]

Notes

a/ Judgement of 19 December 1989, Kamasinksi v. Austria.

b/ Article 6, paragraph 3 (b), of the European Convention reads as follows:

> "Everyone charged with a criminal offence has the following minimum rights:
>
> "...
>
> "(b) to have adequate time and facilities for the preparation of his defence".

Y. Communication No. 455/1991, Allan Singer v. Canada (views adopted on 26 July 1994, fifty-first session)

Submitted by:	Allan Singer
Victim:	The author
State party:	Canada
Date of communication:	30 January 1991 (initial submission)
Date of decision on admissibility:	8 April 1993

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 26 July 1994,

Having concluded its consideration of communication No. 455/1991, submitted to the Human Rights Committee by Mr. Allan Singer under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts its views under article 5, paragraph 4, of the Optional Protocol.

1. The author of the communication is Allan Singer, a Canadian citizen born in 1913 and a resident of Montreal, Canada. He claims to be a victim of language discrimination by Canada, in violation of the International Covenant on Civil and Political Rights, without however specifically invoking article 26 thereof.

The facts as presented by the author

2.1 The author runs a stationery and printing business in Montreal. His clientele is predominantly, but not exclusively, anglophone. Starting in 1978, the author received numerous summons from the Quebec authorities, requesting him to replace commercial advertisements in English outside his store by advertisements in French. The author appealed against all these summons before the local courts and contended that the Charter of the French Language (Bill No. 101) discriminated against him because it restricted the use of English for commercial purposes; in particular, section 58 of Bill No. 101 prohibited the posting of commercial signs in English outside the author's store. In October 1978, the Court of Sessions of Montreal found against him. The Superior Court of Quebec, Montreal, did likewise on 26 March 1982, and so did the Court of Appeal of Quebec in December 1986.

2.2 The author then took his case to the Supreme Court of Canada, which, on 15 December 1988, decided that an obligation to use French only in outdoor advertising was unconstitutional and struck down several provisions of the Quebec Charter of the French Language (*Charte de la langue française*). The Quebec legislature, however, passed another legislative measure, Bill No. 178, on 22 December 1988, the express *ratio legis* of which was to override the judgement handed down by the Supreme Court of Canada one week earlier. With this, the author contends, he has exhausted available remedies.

The complaint

3. The author contends that Bill No. 101, as amended by Bill No. 178, is discriminatory, in that it restricts the use of English to indoor advertising and places businesses that carry out their activities in English in a disadvantageous position vis-à-vis French businesses.

Legislative provisions

4.1 The relevant original provisions of the Charter of the French Language, (Bill No. 101, S.Q. 1977, C-5) have been modified several times. In essence, however, they have remained substantially the same. In 1977, section 58 read as follows:

> "Except as may be provided in this Act or the regulations of the Office de la langue française, signs and posters and commercial advertising shall be solely in the official language."

4.2 The original wording of section 58 was replaced in 1983 by section 1 of the Act to Amend the Charter of the French Language (S.Q. 1983, C-56), which read:

> "58. Public signs and posters and commercial advertising shall be solely in the official language.
>
> "Notwithstanding the foregoing, in the cases and under the conditions or circumstances prescribed by regulation of the Office de la langue française, public signs and posters and commercial advertising may be both in French and another language or solely in another language ..."

4.3 The initial language legislation was struck down by the Supreme Court in La Chaussure Brown's Inc. et al. v. the Attorney General of Quebec (1989) 90 N.R. 84. Following this, section 58 of the Charter was amended by section 1 of Bill No. 178. While certain modifications were made relating to signs and posters inside business premises, the compulsory use of French in signs and posters outside remained.

4.4 Section 58 of the Charter, as modified in 1989 by section 1 of Bill No. 178, read:

> "58. Public signs and posters and commercial advertising, outside or intended for the public outside, shall be solely in French. Similarly, public signs and posters and commercial advertising shall be solely in French,
>
> "1. Inside commercial centres and their access ways, except inside the establishments located there;
>
> "2. Inside any public means of transport and its access ways;
>
> "3. Inside the establishments of business firms contemplated in section 136;
>
> "4. Inside the establishments of business firms employing fewer than fifty but more than five persons, where such firms share, with two or more other business firms, the use of a trademark, a firm name or an appellation by which they are known to the public.

"The Government may, however, by regulation, prescribe the terms and conditions according to which public signs and posters and public advertising may be both in French and in another language, under the conditions set forth in the second paragraph of section 58.1, inside the establishments of business firms contemplated in subparagraphs 3 and 4 of the second paragraph.

"The Government may, in such regulation, establish categories of business firms, prescribe terms and conditions which vary according to the category and reinforce the conditions set forth in the second paragraph of section 58.1".

4.5 Section 6 of Bill No. 178 modified section 68 of the Charter, which read:

"68. Except as otherwise provided in this section, only the French version of a firm name may be used in Quebec. A firm name may be accompanied with a version in another language for use outside Quebec. That version may be used together with the French version of the firm name in the inscriptions referred to in section 51, if the products in question are offered both in and outside Quebec.

"In printed documents, and in the documents contemplated in section 57 if they are both in French and in another language, a version of the French firm name in another language may be used in conjunction with the French firm name.

"When texts or documents are drawn up in a language other than French, the firm name may appear in the other language without its French version.

"On public signs and posters and in commercial advertising,

"1. A firm name may be accompanied with a version in another language, if they are both in French and in another language;

"2. A firm name may appear solely in its version in another language, if they are solely in a language other than French."

4.6 Section 10 of Bill No. 178 contained a so-called "notwithstanding" clause, which provided that:

"The provisions of section 58 and of the first paragraph of section 68, brought into effect under sections 1 and 6 respectively of the present bill, shall operate irrespective of the provisions of section 2, paragraph (b), and section 15 of the Constitutional Act of 1982 ... and shall apply notwithstanding articles 3 and 10 of the Charter of Human Rights and Freedoms."

4.7 Another "notwithstanding" provision is incorporated into section 33 of the Canadian Charter of Human Rights and Freedoms, which reads:

"1. Parliament or the legislature of a province may expressly declare in an act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.

> "2. An act or a provision of an act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.
>
> "3. A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration.
>
> "4. Parliament or the legislature of a province may re-enact a declaration made under subsection (1).
>
> "5. Subsection (3) applies in respect of a re-enactment made under subsection (4)."

The State party's information and observations

5.1 The communication was transmitted to the State party under rule 91 of the Committee's rules of procedure on 5 August 1991. In its submission of 6 March 1992 (which also related to communications Nos. 359/1989 and 385/1989 a/), the State party noted that a number of litigants had challenged the validity of Bill No. 178 before the Quebec courts, and that hearings on the issue before the Court of Quebec were held on 14 January 1992. The proceedings continued, and lawyers for the provincial government of Quebec were scheduled to present the point of view of Quebec on 23 and 24 March 1992.

5.2 The State party contended that Quebec's Code of Civil Procedure entitles the author to apply for a declaratory judgement that Bill No. 178 is invalid, and that this option is open to him regardless of whether criminal charges have been instituted against him or not. It argued that consistent with the well-established principle that effective domestic remedies must be exhausted before the jurisdiction of an international body is engaged, Canadian courts should have an opportunity to rule on the validity of Bill No. 178, before the issue is considered by the Human Rights Committee.

5.3 The State party further argued that the "notwithstanding" clause in section 33 of the Canadian Charter of Rights and Freedoms is compatible with Canada's obligations under the Covenant, in particular with article 4 and with the obligation, under article 2, to provide its citizens with judicial remedies. It explained that, firstly, extraordinary conditions limit the use of section 33. Secondly, section 33 is said to reflect a balance between the roles of elected representatives and courts in interpreting rights:

> "A system in which the judiciary is given full and final say on all issues of rights adversely impacts on a key tenet of democracy - that is, participation of citizens in a forum of elected and publicly accountable legislatures on questions of social and political justice ... The 'notwithstanding' clause provides a limited legislative counterweight in a system which otherwise gives judges final say over rights issues".

5.4 Lastly, the Government affirmed that the existence of section 33 per se is not contrary to article 4 of the Covenant, and that the invocation of section 33 does not necessarily amount to an impermissible derogation under the Covenant: "Canada's obligation is to ensure that section 33 is never invoked in circumstances which are contrary to international law. The Supreme Court of Canada has itself stated that 'Canada's international human rights obligations should [govern] ... the interpretation of the content of the rights guaranteed by the Charter'". Thus, a legislative override could never be invoked to permit acts clearly prohibited by international law. Accordingly, the legislative override in section 33 was said to be compatible with the Covenant.

5.5 The State party therefore requested the Committee to declare the communication inadmissible.

6.1 In his comments, the author contended that his case is against Bill No. 101 and not against Bill No. 178, and that it is based upon the State party's perceived violations of the provisions of the Constitution Act of Canada 1867, and not on the Constitution Act of 1982. He argued that any challenge of the contested legislation would be futile, in the light of the decision of the government of Quebec to override the Supreme Court's judgement of 15 December 1988 by enactment of Bill No. 178 a week later.

6.2 The author claimed that the "notwithstanding" clause of section 33 of the Canadian Charter of Rights and Freedoms does not apply to this case, as he had been charged for violating the Charter of the French Language in 1978, before section 33 took effect. In this context, he argued that no Canadian Government can abrogate or supplant freedoms that were in existence before the Charter came into being, and that under the Canadian tradition of civil liberties, rights may be extended but cannot be curtailed.

6.3 Finally, the author asserted that the "notwithstanding" clause of section 33 is a negation of the rights enshrined in the Charter, as it allows (provincial) legislatures to "attack minorities and suspend their rights for a period of five years".

The Committee's decision on admissibility

7.1 During its forty-seventh session and after the Committee had adopted its views in respect of communications Nos. 359/1989 and 385/1989, a/ in which similar issues were raised, the Committee considered the admissibility of the communication. It disagreed with the State party's contention that there were still effective remedies available to the author. In this context, it noted that in spite of repeated legislative changes protecting the visage linguistique of Quebec, and despite the fact that some of the relevant statutory provisions had been declared unconstitutional successively by the Superior, Appeal and Supreme Courts, the only effect of this had been the replacement of these provisions by ones that are the same in substance as those they replaced, but reinforced by the "notwithstanding" clause of section 10 of Bill No. 178.

7.2 As to whether a declaratory judgement declaring Bill No. 178 invalid would provide the author with an effective remedy, the Committee noted that such a judgment would leave the Charter of the French Language operative and intact, and that the legislature of Quebec could still override any such judgement by replacing the provisions struck down by others substantially the same and by invoking the "notwithstanding" clause of the Charter of Rights and Freedoms.

7.3 The Committee considered that the author had made a reasonable effort to substantiate his allegations, for purposes of admissibility. Although the author had specifically challenged only Bill No. 101, which was amended by Bill No. 178 in 1988, the Committee found that it was not precluded from examining the compatibility of both laws with the Covenant, as the central issue, language-based discrimination in commercial outdoor advertising, remained the same.

7.4 On 8 April 1993, therefore, the Committee declared the communication admissible.

The State party's information and observations on the admissibility and on the merits of the communication, and the author's comments thereon

8.1 Under cover of a note dated 4 May 1994, the State party forwards a submission from the government of Quebec, dated 21 February 1994, in which it submits that the author claims before the Committee violations of rights enjoyed by his company "Allan Singer Limited". It notes that under article 1 of the Optional Protocol to the Covenant and paragraph (a) of rule 90 of the Committee's rules of procedure, only individuals may submit a communication to the Human Rights Committee. With reference to the Committee's jurisprudence, b/ the government of Quebec submits that a company incorporated under Quebec legislation has no standing before the Committee.

8.2 With regard to the author's claim under article 26 of the Covenant, reference is made to the Committee's findings in communications Nos. 359/1989 (Ballantyne/Davidson v. Canada) and 385/1989 (McIntyre v. Canada); the Committee concluded that sections 1 and 6 of Bill No. 178 were compatible with article 26 of the Covenant.

9.1 The government of Quebec further refers to the information provided pursuant to the Committee's request for relevant measures taken in connection with the Committee's views in communications Nos. 359/1989 and 385/1989. It points out that sections 58 and 68 of the Charter of the French Language, on which the present communication is based, have been amended by Bill No. 86, entitled Act to Amend the Charter of the French Language (Loi modifiant la Charte de la langue française) (L.Q. 1993, c.40; projet de loi 86), which was adopted on 18 June 1993 and entered into force on 22 December 1993. Section 58 of the Charter of the French Language, as modified by section 18 of Bill No. 86, now reads:

> "58. Public signs and posters and commercial advertising must be in French.
>
> "They may also be both in French and in another language provided that French is markedly predominant.
>
> "However, the Government may determine by regulation, the places, cases, conditions or circumstances where public signs and posters and commercial advertising must be in French only, where French need not be predominant or where such signs, posters and advertising may be in another language only."

9.2 The Quebec Regulations on the Language of Commerce and Business (Réglement sur la langue du commerce et des affaires) entered into force on 22 December 1993; the exceptions mentioned in the third paragraph of section 58 are spelled out in sections 15 to 25 of the Regulations. It is submitted that only in two well-defined situations, the commercial advertising of a firm must be exclusively in French. c/ Furthermore, sections 17 to 21 cover situations in which public signs and posters and commercial advertising may be displayed both in French and in another language provided that French appears at least as prominently. d/ Finally, sections 22 to 25 provide for situations in which public signs and commercial advertising may be exclusively in a language other than French. e/

9.3 Section 68 of the Charter of the French Language, as modified by section 22 of Bill No. 86, now reads:

> "68. A firm name may be accompanied with a version in a language other than French provided that, when it is used, the French version of the firm name appears at least as prominently.
>
> "However, in public signs and posters and commercial advertising, the use of a version of a firm name in a language other than French is permitted to the extent that the other language may be used in such signs and posters or in such advertising pursuant to section 58 and the regulations enacted under that section.
>
> "In addition, in texts or documents drafted only in a language other than French, a firm name may appear in the other language only."

9.4 The Quebec authorities point out that under the current Act and the corresponding Regulations, public signs and posters and commercial advertising may be displayed either in French or either both in French and another language. They further submit that, contrary to the situation that prevailed under the previous legislation, sections 58 and 68 of the Charter of the French Language, as modified by Bill No. 86, are not protected by a derogation clause, and their constitutional validity may thus be challenged before the domestic courts. From the above, the authorities deduce that the issues raised by Mr. Singer have become moot, and that his case should therefore be dismissed.

10.1 In his reply dated 9 June 1994, the author submits that the question of whether he or his company have been the victim of violations of Covenant rights is irrelevant. He explains that for many years, he was the main shareholder, with over 90 per cent of the shares, and that two members of his family held the remaining shares.

10.2 With regard to Bill No. 178 and Bill No. 86, the author points out that they were both adopted after the Supreme Court of Canada had heard his case in December 1988 and had struck down several provisions of the Charter of the French Language; he argues that the Quebec legislature can repeal Bill No. 86 and reimpose Bill No. 178 at any time.

Review of admissibility and examination of the merits

11.1 The Committee has taken note of the parties' comments, made subsequent to the decision on admissibility, in respect of the admissibility and the merits of the communication.

11.2 The State party has contended that the author is claiming violations of rights of his company, and that a company has no standing under article 1 of the Optional Protocol. The Committee notes that the Covenant rights that are at issue in the present communication, and in particular the right of freedom of expression, are by their nature inalienably linked to the person. The author has the freedom to impart information concerning his business in the language of his choice. The Committee therefore considers that the author himself, and not only his company, has been personally affected by the contested provisions of Bills Nos. 101 and 178.

11.3 The Committee appreciates the State party's information on the measures taken in respect of the Committee's views in communications Nos. 359/1989 and 385/1989. It does not, however, share the State party's opinion that since the law in question has been amended and now provides for the possibility to use either French or both French and another language in outdoor advertising, Mr. Singer's claims have become moot. The Committee notes that the court proceedings referred to in the case were based on the Charter of the French Language in its version then in force (Bill No. 101). The Committee further notes that after the Supreme Court of Canada had, in 1988, found in Mr. Singer's favour, the contested provisions of Bill No. 101 were amended by those of Bill No. 178. Notwithstanding, the use of French in outdoor advertising remained compulsory. This situation was the basis of Mr. Singer's complaint to the Committee. That Bill No. 178 was amended by Bill No. 86 after the Committee adopted its views on communications Nos. 359/1989 and 385/1989 does not retroactively render his communication inadmissible.

11.4 In the light of the above, the Committee sees no reason to review its decision on admissibility of 8 April 1993.

12.1 As to the merits of the case, the Committee notes that its observations on communications Nos. 359/1989 (Ballantyne/Davidson v. Canada) and 385/1989 (McIntyre v. Canada) apply, *mutatis mutandis*, to the case of Mr. Singer.

12.2 Concerning the question of whether section 58 of Bill No. 101, as amended by Bill No. 178, section 1, violated Mr. Singer's right, under article 19 of the Covenant, to freedom of expression, the Committee, having concluded that a State party to the Covenant may choose one or more official languages, but that it may not exclude, outside the spheres of public life, the freedom to express oneself in a language of one's choice, finds that there has been a violation of article 19, paragraph 2. In the light of this finding, the Committee need not address any issues that may arise under article 26.

13. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it reveal a violation of article 19, paragraph 2, of the Covenant.

14. The Committee notes that the contested provisions of the Quebec Charter of the French Language were amended by Bill No. 86 in June 1993, and that under the current legislation Mr. Singer has the right, albeit under specified conditions and with two exceptions, to display commercial advertisements outside his store in English. The Committee observes that it has not been called upon to consider whether the Charter of the French Language in its current version is compatible with the provisions of the Covenant. In the circumstances, it concludes that the State party has provided Mr. Singer with an effective remedy.

[Adopted in English, French and Spanish, the English text being the original version.]

Notes

a/ Official Records of the General Assembly, Forty-eighth Session, Supplement No. 40 (A/48/40), annex XII.P, communications Nos. 359/1989 (Ballantyne and Davidson v. Canada) and 385/1989 (McIntyre v. Canada), views adopted on 31 March 1993 at the Committee's forty-seventh session.

b/ Ibid., Forty-fourth Session, Supplement No. 40 (A/44/40), annex XI.M, communication No. 361/1989 (A publication and printing company v. Trinidad and

Tobago), declared inadmissible on 14 July 1989, at the Committee's thirty-sixth session, para. 3.2.

c/ *Section 15 of the Regulations prescribes that: "A firm's commercial* advertising, displayed on billboards, on signs or posters or on any other medium having an area of 16 square metres or more and visible from any public highway ... must be exclusively in French unless the advertising is displayed on the very premises of an establishment of the firm."

Section 16 provides that: "A firm's commercial advertising on or in any public means of transportation and on or in the accesses thereto, including bus shelters, must be exclusively in French."

d/ Section 17 relates to public signs and posters displayed on or in a vehicle regularly used to transport passengers or merchandise, both in and outside Quebec.

Section 18 relates to public signs and posters concerning health or public safety.

Section 19 relates to public signs and posters on the premises of a museum, botanical garden, zoo or cultural or scientific exhibition.

Section 20 relates to an event intended for an international public or an event in which the majority of participants come from outside Quebec.

Section 21 concerns the directions for the use of a device permanently installed in a public place.

e/ Section 22 states that: "Unless the vehicle used is a news medium which publishes or broadcasts in French, public signs and posters and commercial advertising concerning a cultural or educational product ..., a cultural or educational activity ... or a news medium may be exclusively in a language other than French, provided that the content of the cultural or educational product is in that other language, the activity is held in that other language or the news medium publishes or broadcasts in that other language, as the case may be."

Section 23 states that: "Public signs and posters displayed by a natural person for non-professional and non-commercial purposes may be in the language of the person's choice."

Section 24 provides that: "Public signs and posters and commercial advertising concerning a convention, conference, fair or exhibition intended solely for a specialized or limited public may, during the event, be exclusively in a language other than French."

Section 25 states that: "On public signs and posters and in commercial advertising, the following may appear exclusively in a language other than French:

"1. The firm name of a firm established exclusively outside Quebec;

"2. A name of origin, the denomination of an exotic product or foreign speciality, a heraldic motto or any other non-commercial motto;

"3. A place name ..., a family name, a given name or the name of a personality or character or a distinctive name of a cultural nature;

"4. A *recognized trade mark* ..., unless a French version has been registered."

Z. Communication No. 456/1991, Ismet Celepli v. Sweden (views adopted on 18 July 1994, fifty-first session)

Submitted by:	Ismet Celepli (represented by counsel)
Victim:	The author
State party:	Sweden
Date of communication:	17 February 1991
Date of decision on admissibility:	19 March 1993

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 18 July 1994,

Having concluded its consideration of communication No. 456/1991, submitted to the Human Rights Committee by Mr. Ismet Celepli under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, his counsel and the State party,

Adopts its views under article 5, paragraph 4, of the Optional Protocol.

1. The author of the communication (dated 17 February 1991) is Ismet Celepli, a Turkish citizen of Kurdish origin living in Sweden. He claims to be the victim of violations of his human rights by Sweden. He is represented by counsel.

The facts as submitted by the author

2.1 In 1975, the author arrived in Sweden, fleeing political persecution in Turkey; he obtained permission to stay in Sweden but was not granted refugee status. Following the murder of a former member of the Workers' Party of Kurdistan in June 1984 at Uppsala, suspicions of the author's involvement in terrorist activities arose. On 18 September 1984, the author was arrested and taken into custody under the Aliens Act; he was not charged with any offence. On 10 December 1984, an expulsion order against him and eight other Kurds was issued pursuant to sections 30 and 47 of the Swedish Aliens Act. The expulsion order was not, however, enforced, as it was believed that the Kurds could be exposed to political persecution in Turkey in the event of their return. Instead, the Swedish authorities prescribed limitations and conditions concerning the Kurds' place of residence.

2.2 Under these restrictions, the author was confined to his home municipality (Västerhaninge, a town of 10,000 inhabitants 25 kilometres south of Stockholm) and had to report to the police three times a week; he could not leave or change his town of residence nor change employment without prior permission from the police.

2.3 Under Swedish law, there exists no right to appeal against a decision to expel a suspected terrorist or to impose restrictions on his freedom of movement. The restrictions of the author's freedom of movement were alleviated in August 1989 and the obligation to report to the police was reduced to once a week. On 5 September 1991, the expulsion order was revoked; the restrictions on his liberty of movement and the reporting obligations were abolished.

The complaint

3.1 It is submitted that the Government reached its decision to expel the author after an inquiry by the Municipal Court of Stockholm, which allegedly obtained its information mainly from the Swedish security police. The author claims that the hearing before the Court, which took place in camera, was more like an interrogation than an investigation. A request for information about the basis of the suspicions against the nine Kurds was refused on grounds of national security. The author, who states that he was never involved in terrorist activities, claims that he was subjected to a regime of residence restrictions, although the grounds for this measure were not disclosed to him, and although he was not given an opportunity to prove his innocence and to defend himself before an independent and impartial tribunal. Moreover, he claims that he was not afforded the right to a review of the Government's decision. He emphasizes that he was never charged with a crime.

3.2 The author further alleges that he and his family have been harassed by the Swedish security police, and that they have been isolated and discriminated against in their municipality because the Government and the media have labelled them as terrorists. The author also states that his health has deteriorated and that he suffers from a "post-traumatic stress disorder" owing to his experiences with the Swedish authorities.

3.3 Although the author does not invoke any specific articles of the Covenant, it appears from his submission that he claims to be a victim of a violation by Sweden of articles 7, 9, 12, 13 and 17 of the International Covenant on Civil and Political Rights.

The State party's observations and the author's comments thereon

4.1 By a submission dated 7 October 1991, the State party argues that the communication is inadmissible on the grounds of non-substantiation and incompatibility with the provisions of the Covenant.

4.2 The State party submits that the restrictions placed upon the author were in conformity with the 1980 Aliens Act, article 48 (1) of which read: "Where it is required for reasons of national security, the Government may expel an alien or prescribe restrictions and conditions regarding his place of residence, change of domicile and employment, as well as duty to report". In July 1989, this Act was replaced by the 1989 Aliens Act. According to a recent amendment to this Act, the possibility to prescribe an alien's place of residence no longer exists. The State party emphasizes that the measures against aliens suspected of belonging to terrorist organizations were introduced in 1973 as a reaction to increased terrorist activities in Sweden; they were only applied in exceptional cases, where there were substantial grounds to fear that the person in question played an active role in planning or executing terrorist activities.

4.3 The State party submits that on 31 August 1989, a decision was taken to allow the author to stay within the boundaries of the whole county of Stockholm; his obligation to report to the police was reduced to once a week. On 5 September 1991, the expulsion order against the author was revoked.

4.4 The State party argues that a right to asylum is not protected by the Covenant and refers to the Committee's decision with regard to communication No. 236/1987. a/

4.5 The State party argues that article 9 of the Covenant, which protects the right to liberty and security of the person, prohibits unlawful arrest and detention, but does not apply to mere restrictions on liberty of movement, which are covered by article 12. The State party argues that the restrictions on his freedom of movement were not so severe that his situation could be characterized as a deprivation of liberty within the meaning of article 9 of the Covenant. Moreover, the author was free to leave Sweden to go to another country of his choice. The State party therefore contends that this part of the communication is not substantiated and should be declared inadmissible.

4.6 With regard to the author's claim that he is a victim of a violation of article 12 of the Covenant, the State party submits that the freedom of movement protected by this article is subject to the condition that the individual is "lawfully within the territory of a State". The State party contends that the author's stay in Sweden, after the decision was taken to expel him on 10 December 1984, was only lawful within the boundaries of the Haninge municipality and later, after 31 August 1989, within the boundaries of the county of Stockholm. The State party argues that the author's claim under article 12 is incompatible with the provisions of the Covenant, since the author can only be regarded as having been lawfully in the country to the extent that he complied with the restrictions imposed upon him.

4.7 Moreover, the State party invokes article 12, paragraph 3, which provides that restrictions may be imposed upon the enjoyment of rights under article 12, if they are provided by law and necessary for the protection of national security and public order, as in the present case. The State party argues therefore that these restrictions are compatible with article 12, paragraph 3, and that the author's claim is unsubstantiated within the meaning of article 2 of the Optional Protocol. In this connection, the State party refers to the Committee's decision declaring communication No. 296/1988 inadmissible. b/

4.8 With regard to article 13 of the Covenant, the State party argues that the decision to expel the author was reached in accordance with the relevant domestic law. In this context, the State party refers to the Committee's decision in communication No. 58/1979, c/ where the Committee considered that the interpretation of domestic law was essentially a matter for the courts and authorities of the State party concerned. The State party contends that in the present case, compelling reasons of national security required that exceptions be made with regard to the right to review of the decision. According to the State party, the communication is therefore unsubstantiated with respect to article 13 and should be declared inadmissible under article 2 of the Optional Protocol.

4.9 The State party forwards a copy of the text of the decision of the European Commission of Human Rights in a similar case, d/ which was declared inadmissible as manifestly ill-founded and incompatible *ratione materiae*.

5.1 In his comments on the State party's submission, the author reiterates that he was never accused of having committed any crime and that the State party's decision to declare him a potential terrorist was solely based upon information from the SAPO.

5.2 As regards the revoking of the expulsion order and the abolition of the restrictions, the author points out that the State party has not yet recognized that he was no potential terrorist. In this context, he states that the SAPO has provided information about him to Interpol. He claims that this means, in practice, that he can never leave Sweden without fearing for his safety.

5.3 With regard to the State party's arguments that the restrictions on his freedom of movement cannot be considered to be so severe as to constitute a deprivation of liberty, the author argues that a residence restriction can be considered a deprivation of liberty when it is of considerable duration or when it has serious consequences. He claims that his condition, being under residence restriction for nearly seven years and having to report to the police three times a week for five years, was so severe as to amount to a deprivation of liberty, within the meaning of article 9 of the Covenant.

5.4 The author further submits that although he has not been charged with any criminal offence, the effects of the treatment he was subjected to were such as to make him a criminal in the eyes of the public and amounted to harsh punishment for an offence with which he has not been charged and against which he has not been able to defend himself.

5.5 The author further claims that the residence restriction imposed upon him amounted to inhuman treatment prohibited by article 7 of the Covenant. He supports this claim by referring to the opinion of Mr. Pär Borgå, a Swedish doctor working for the Centre for Tortured Refugees, where the author received treatment. In this connection, the author refers to alleged harassment by the police.

The Committee's decision on admissibility

6.1 During its forty-seventh session, the Committee considered the admissibility of the communication. It observed that the same matter was not being or had not been examined under another procedure of international investigation or settlement. The Committee considered that the author had not substantiated, for purposes of admissibility, his claim under articles 7 and 17 of the Covenant, and that his claims under articles 9 and 13 of the Covenant were incompatible with these provisions.

6.2 On 19 March 1993, the Committee declared the communication admissible in so far as it might raise issues under article 12 of the Covenant.

The State party's submission on the merits and the author's comments thereon

7.1 The State party, by submission of 9 November 1993, argues that Mr. Celepli was not lawfully within the territory of Sweden after an expulsion order had been issued against him on 10 December 1984. The State party submits that whether a person is lawfully within the territory of the State or not is determined according to national law. It explains that the expulsion order could not be enforced for humanitarian reasons, but that in principle the decision was taken that the author should not be allowed to stay in Sweden. The State party refers to its submission on admissibility and reiterates that the author's stay in Sweden after 10 December 1984 was only lawful under the condition that it did not extend beyond the borders of first the Haninge community and, later, the borders of the county of Stockholm.

7.2 The State party further submits that, if the author would have left Sweden at any time after 10 December 1984, he would not have been allowed to return.

The State party argues that the issuing of the expulsion order made the author's stay unlawful, even though the order was not enforced. In this connection, the State party argues that if the order had been enforced, the author would have been outside the country, as a consequence of which no issue under article 12 could arise.

7.3 As regards the second issue identified by the Committee of whether a person's freedom of movement may lawfully be restricted for reasons of national security without allowing appeal against such decision, the State party notes that article 12 does not contain a right to appeal against a decision restricting a person's liberty of movement.

7.4 In the present case, the State party submits that, although the author did not have a possibility of a formal appeal against the decision, the decision was in fact open to review. In this context, the State party recalls that the author was sentenced on several occasions for not complying with the restriction order and argues that in order to convict a person and sentence him, the court has to examine whether the restrictions were imposed in accordance with domestic law and assess whether they were imposed on reasonable grounds. The State party furthermore indicates that, according to domestic law, the expulsion order, on which the restriction order was based, had to be reconsidered by the Government whenever there was cause to do so. In this context, the State party emphasizes that the restrictions on the author's freedom of movement were reviewed several times, resulting in their complete abolishment on 11 October 1990.

7.5 The State party further invokes compelling reasons of national security, which made it necessary to restrict the author's freedom of movement without providing a possibility of appeal and refers in this context to article 13 of the Covenant, which allows an exception, when compelling reasons of national security so require, to the provision that a decision of expulsion be subjected to review. It concludes, taking into account that it in fact did review the restrictions on the author's freedom of movement several times, that article 12 has not been violated in Mr. Celepli's case.

8. In his comments, dated 30 December 1993, the author emphasizes that if the State party had grounds to suspect him of criminal or terrorist activities, it should have charged him and brought him to trial. He claims that he never was a member of the Workers' Party of Kurdistan, that the restrictions were placed upon him for internal political reasons and that he never was given the opportunity to challenge the reasons underlying the restriction order.

Issues and proceedings before the Committee

9.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

9.2 The Committee notes that the author's expulsion was ordered on 10 December 1984, but that this order was not enforced and that the author was allowed to stay in Sweden, subject to restrictions on his freedom of movement. The Committee is of the view that following the expulsion order, the author was lawfully in the territory of Sweden, for purposes of article 12, paragraph 1, of the Covenant, only under the restrictions placed upon him by the State party. Moreover, bearing in mind that the State party has invoked reasons of national security to justify the restrictions on the author's freedom of movement, the Committee finds that the restrictions to which the author was subjected were compatible with those allowed pursuant to article 12, paragraph 3, of the

Covenant. In this connection, the Committee also notes that the State party *motu proprio* reviewed said restrictions and ultimately lifted them.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it do not reveal a violation by the State party of any of the articles of the Covenant.

[Adopted in English, French and Spanish, the English text being the original version.]

Notes

[a] *Official Records of the General Assembly, Forty-third Session, Supplement No. 40* (A/43/40), annex VIII.F, *V.M.R.B. v. Canada*, declared inadmissible on 18 July 1988.

[b] Ibid., *Forty-fourth Session, Supplement No. 40* (A/44/40), annex XI.G, *J.R.C. v. Costa Rica*, declared inadmissible on 30 March 1989.

[c] Ibid., *Thirty-sixth Session, Supplement No. 40* (A/36/40), annex XVIII, *Anna Maroufidou v. Sweden*, views adopted on 9 April 1981.

[d] Application No. 13344/87, *Ulusoy v. Sweden*, declared inadmissible on 3 July 1989.

AA. Communication No. 458/1991, Albert Womah Mukong v. Cameroon (views adopted on 21 July 1994, fifty-first session)

Submitted by:	Albert Womah Mukong (represented by counsel)
Victim:	The author
State party:	Cameroon
Date of communication:	26 February 1991 (initial submission)
Date of decision on admissibility:	8 July 1992

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 21 July 1994,

Having concluded its consideration of communication No. 458/1991, submitted to the Human Rights Committee by and on behalf of Mr. Albert Womah Mukong under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, his counsel and the State party,

Adopts its views under article 5, paragraph 4, of the Optional Protocol.

1. The author of the communication is Albert Womah Mukong, a citizen of Cameroon born in 1933. He claims to be a victim of violations by Cameroon of articles 7; 9, paragraphs 1 to 5; 12, paragraph 4; 14, paragraphs 1 and 3; and 19 of the International Covenant on Civil and Political Rights. He is represented by counsel. The Optional Protocol entered into force for Cameroon on 27 September 1984.

The facts as submitted by the author

2.1 The author is a journalist, writer and long-time opponent of the one-party system in Cameroon. He has frequently and publicly advocated the introduction of multi-party democracy and has worked towards the establishment of a new political party in his country. He contends that some of the books that he has written were either banned or prohibited from circulation. In the summer of 1990, he left Cameroon, and in October 1990 applied for asylum in the United Kingdom of Great Britain and Northern Ireland. In December 1990, his wife left Cameroon for Nigeria with her two youngest children.

2.2 On 16 June 1988, the author was arrested, after an interview given to a correspondent of the British Broadcasting Corporation (BBC), in which he had criticized both the President of Cameroon and the Government. He claims that in detention, he was not only interrogated about this interview but also subjected to cruel and inhuman treatment. He indicates that from 18 June to 12 July, he was continuously held in a cell, at the First Police District of Yaoundé, measuring approximately 25 square metres, together with 25 to 30 other detainees. The cell did not have sanitary facilities. As the authorities refused to feed him initially, the author was without food for several days, until his friends and family managed to locate him.

2.3 From 13 July to 10 August 1988, Mr. Mukong was detained in a cell at the headquarters of the Police Judiciaire in Yaoundé, together with common criminals. He claims that he was not allowed to keep his clothes, and that he was forced to sleep on a concrete floor. Within two weeks of detention under these conditions, he fell ill with a chest infection (bronchitis). Thereafter, he was allowed to wear his clothes and to use old cartons as a sleeping mat.

2.4 On 5 May 1989, the author was released, but on 26 February 1990, he was again arrested, following a meeting on 23 January 1990 during which several people, including the author, had (publicly) discussed ways and means of introducing multi-party democracy in Cameroon.

2.5 Between 26 February and 23 March 1990, Mr. Mukong was detained at the Mbope Camp of the Brigade mobile mixte in Douala, where he allegedly was not allowed to see either his lawyer, his wife or his friends. He claims that he was subjected to intimidation and mental torture, in that he was threatened that he would be taken to the torture chamber or shot, should any unrest among the population develop. He took these threats seriously, as two of his opposition colleagues, who were detained with him, had in fact been tortured. On one day, he allegedly was locked in his cell for twenty-four hours, suffering from the heat (temperatures above 40°C). On another day, he allegedly was beaten by a prison warder when he refused to eat.

2.6 The author contends that there is no effective remedy for him to exhaust, and that he should be deemed to have complied with the requirements of article 5, paragraph 2 (b), of the Optional Protocol. In respect of his arrests in 1988 and 1990, he claims that although Ordinance 62/OF/18 of 12 March 1962, under which he was charged with "intoxication of national and international public opinion", was abrogated by Law 090/046 of 19 December 1990, the fact remains that at the time of his arrest, the peaceful public expression of his opinions was considered a crime. The author adds that there is no procedure under domestic law by which one could challenge a law as being incompatible with international human rights standards; fundamental human rights are only guaranteed in the preamble to the country's Constitution, and the preambular paragraphs are not enforceable. The fact that the Ordinance of 1962 was abrogated in 1990 did not provide the author with relief, since it did not mean that he could challenge his detention during his imprisonment and, as it was not made retroactive, it did not mean that he could seek compensation for unlawful detention.

2.7 The author further submits that the examining judge of the tribunal of Bafoussam found him guilty as charged and, by order of 25 January 1989, placed him under military jurisdiction. He explains that under domestic law, this examining magistrate does not decide on either guilt or innocence of an accused, but merely on whether sufficient evidence exists to justify an extension of the detention and to place him under military jurisdiction; the placement under military jurisdiction allegedly could not be challenged.

2.8 It is noted that the author's lawyer twice applied to the High Court of Cameroon for writs of habeas corpus. Both were rejected on the ground that the case was before a military tribunal and that no writ of habeas corpus lies against charges to be determined by a military tribunal. The author submits that if it was not possible to challenge his detention by writ of habeas corpus, then other, theoretically existing, remedies were not in fact available to him.

2.9 As to remedies against cruel, inhuman and degrading treatment and torture, the author notes that the Prosecutor (Ministère Public) may only prosecute a civil claim for cruel, inhuman and degrading treatment on behalf of a person who is the accused in a pending criminal matter. Under section 5 of Ordinance 72/5 of 26 August 1972, a Military Tribunal cannot entertain a civil action separately from a criminal action for which it has been declared competent. Only the Minister of Defense or the examining magistrate can seize the military tribunal with a civil action; civilians cannot do so. Finally, the author cites from and endorses the conclusions of a recent Amnesty International report, according to which the organization "knows of no cases in recent years where torture allegations have been the subject of official inquiry in Cameroon. The authorities also appear to have blocked civil actions for damages lodged before the courts by former detainees ...". He concludes that the pursuit of domestic remedies would be ineffective and that, if he were to initiate such proceedings, he would be subjected to further harassment.

The complaint

3.1 The author alleges a violation of article 7 of the Covenant on account of the treatment he was subjected to between 18 June and 10 August 1988, and during his detention at the Mbope Camp.

3.2 The author further alleges a violation of article 9, as he was not served a warrant for his arrest on 16 June 1988. Charges were not brought until almost two months later. Moreover, the military tribunal designated to handle his case postponed the hearing of the case on several occasions until, on 5 May 1989, it announced that it had been ordered by the Head of State to withdraw the charges and release the author. Again, the arrest on 26 February 1990 occurred without a warrant being served. On this occasion, charges were not filed until one month later.

3.3 It is further submitted that the State party authorities violated article 14, paragraphs 1 and 3, in that the author was not given any details of the charges against him; neither was he given time to prepare his defence adequately. The author claims that the court - a military tribunal - was neither independent nor impartial, as it was clearly subject to the influence of high-level government officials. In particular, as the judges were military officers, they were subject to the authority of the President of Cameroon, himself the Commander-in-Chief of the armed forces.

3.4 The author notes that his arrests on 16 June 1988 and 26 February 1990 were linked to his activities as an advocate of multi-party democracy, and claims that these were Government attempts designed to suppress any opposition activities, in violation of article 19 of the Covenant. This also applies to the Government's ban, in 1985, of a book written by the author (Prisoner without a Crime), in which he described his detention in local jails from 1970 to 1976.

3.5 Finally, it is submitted that article 12, paragraph 4, was violated, as the author is now prevented from returning to his country. He has been warned that if he were to return to Cameroon, the authorities would immediately re-arrest him. This reportedly is attributable to the fact that in October 1990, the author delivered a petition to the Secretary-General of the United Nations, seeking his good offices to persuade the State party's authorities to observe and respect General Assembly document A/C.4/L.685 of 18 April 1961 entitled "The question of the future of the Trust Territory of the Cameroons under United Kingdom Administration".

The State party's information and observations

4.1 The State party recapitulates the facts leading to the author's apprehension. According to it, the interview given by the author to the BBC on 23 April 1988 was full of half truths and untruths, such as the allegation that the country's economic crisis was largely attributable to the Cameroonians themselves, as well as allusions to widespread corruption and embezzlement of funds at the highest levels of Government which had remained unpunished. The author was arrested after the airing of this interview because, in the State party's opinion, he could not substantiate his declarations. They were qualified by the State party as "intoxication of national and international public opinion" and thus as subversive within the meaning of Ordinance No. 62/OF/18 of 12 March 1962. Upon order of the Assistant Minister of Defence of 5 January 1989, the author was charged with subversion by the examining magistrate of the military tribunal of Bafoussam. On 4 May 1989, the Assistant Minister decreed the closure of the investigations against the author; he was notified of this decision on 5 May 1989.

4.2 The State party contends that in respect of his allegations under article 7, the author failed to initiate judicial proceedings against those held responsible for his treatment. In this connection, it observes that he could have:

(a) Denounced the treatment of which he was a victim to the competent Ministry, which should then have investigated the allegations;

(b) Filed a civil action with the Magistrate responsible for judicial investigation and information;

(c) Directly filed a complaint with the competent tribunal against those held to be responsible for the acts;

(d) Charged the responsible officers of having abused their official function, pursuant to article 140 of the Criminal Code;

(e) Invoked articles 275 and 290 of the Criminal Code, which provide protection against attacks on the physical integrity of the person;

(f) Invoked articles 291 and 308 of the same Code, which provide protection against attacks on the liberty and security of persons;

(g) Petitioned the Administrative Chamber of the Supreme Court under article 9 of Ordinance 72/6 of 26 August 1972, as amended by Law 75/16 of 8 December 1975 and Law 76/28 of 14 December 1976, if he considered himself to be a victim of an administrative wrong.

4.3 In respect of the legal basis for the arrest of Mr. Mukong in 1988 and 1990, the State party notes that Ordinance 62/OF/18 was abrogated by Law No. 090/046 of 19 December 1990.

The Committee's decision on admissibility

5.1 During its forty-fifth session, the Committee considered the admissibility of the communication. It took note of the State party's contention that the author had not availed himself of judicial remedies in respect of claims of ill-treatment and of inhuman and degrading treatment in detention. The Committee observed, however, that the State party had merely listed *in abstracto* the existence of several remedies without relating them to the circumstances of the case, and without showing how they might provide effective redress in the circumstances of the case. This applied in particular to the period of detention from 26 February to 23 March 1990, when the author was allegedly held incommunicado and subjected to threats. The Committee concluded that in the circumstances, it could not be held against the author if he did not petition the courts after his release and that, in the absence of further information from the State party, there was no further effective domestic remedy to exhaust.

5.2 As to the author's claims under articles 9, 14 and 19, the Committee notes that the simple abrogation of a law considered incompatible with the provisions of the Covenant - i.e. Ordinance 62/OF/18 of 12 March 1962 - did not constitute an effective remedy for any violations of an individual's rights which had previously occurred under the abrogated law. As the State party had not shown the existence of other remedies in respect of these claims, the Committee considered them to be admissible.

5.3 On 8 July 1992, therefore, the Committee declared the communication admissible, reserving however the right to review its decision pursuant to rule 93, paragraph 4, of the rules of procedure, in respect of the author's claim under article 7.

The State party's request for review of admissibility and observations on the merits, and the author's comments thereon

6.1 In its submission under article 4, paragraph 2, of the Optional Protocol, the State party argues that the reasons for declaring the communication admissible are no longer valid and accordingly requests the Committee to review its decision on admissibility.

6.2 After once again questioning the correctness of the author's version of the facts, it addresses the author's claims. As to the alleged violation of article 7 on account of the conditions of the author's detention, it notes that article 1 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment stipulates that the term "torture" does not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions. It adds that the situation and comfort in the country's prisons must be linked to the state of economic and social development of Cameroon.

6.3 The State party categorically denies that Mr. Mukong was, at any time during his detention in June 1988 or in February/March 1990, subjected to torture or cruel, inhuman or degrading treatment. It submits that the burden of proof for his allegations lies with the author, and that his reference to Amnesty International reports about instances of torture in Cameroonian prisons cannot constitute acceptable proof. The State party includes a report of an investigation into the author's allegations carried out by the National Centre for Studies and Research which concludes that the prison authorities in Douala actually sought to improve the prison conditions after the arrest of the author and a number of co-defendants, and that the "excessive heat" in the author's cell (above 40°C) is simply the result of the climatic conditions in Douala during the month of February.

6.4 The State party reiterates that the author has failed to exhaust available remedies, as required under article 5, paragraph 2 (b), of the Optional Protocol and article 41 (c) of the Covenant. It takes issue with the Committee's jurisprudence that domestic remedies must not only be available but also effective. It further dismisses the author's contention as reflected in paragraph 2.9 above and refers in this context to section 8 (2) of Ordinance 72/5 of 26 August 1972, as modified by Law No. 74/4 of 16 July 1974. This provision stipulates that the military tribunal is seized directly either upon request of the Ministry of Defence, upon request of the examining magistrate (ordonnance de renvoi du juge d'instruction), or by decision of the Court of Appeal. The State party argues that the modalities of appealing to this jurisdiction of exceptional nature demonstrate that its function is purely repressive. This does not rule out, however, the possibility for an individual to appear before the tribunal as an intervenor ("n'exclut point la constitution de partie civile") (art. 17 of Ordinance 72/5). In any event, it remains possible to file civil actions for damages before the ordinary tribunals.

6.5 The State party further rejects as incorrect the author's endorsement of the conclusions of a report published by Amnesty International (referred to in paragraph 2.9) and submits that this document reveals total ignorance of the judicial system of Cameroon and in particular of domestic criminal procedure, which allows the victim [of ill-treatment] to have the person responsible for his treatment prosecuted and indicted before the competent courts, even against the advice of the office of the public prosecutor. The State party further refers to several court decisions, which in its opinion demonstrate that, far from being suppressed by the authorities, claims for damages are entertained by the local courts, and that the claimants in or the parties to such proceedings do not have to fear harassment as a result, as claimed by Mr. Mukong.

6.6 The State party argues that the author's arrest(s) in June 1988 and February 1990 cannot be qualified as arbitrary because they were linked to his activities, considered illegal, as an opposition activist. It denies that the author was not given a fair trial, or that his freedom of expression or of opinion have been violated.

6.7 In this context, the State party argues that the arrest of the author was for activities and forms of expression that are covered by the limitation clause of article 19, paragraph 3, of the Covenant. It contends that the exercise of the right to freedom of expression must take into account the political context and situation prevailing in a country at any point in time. Since the independence and reunification of Cameroon, the country's history has been a constant battle to strengthen national unity, first at the level of the francophone and anglophone communities and thereafter at the level of the more than 200 ethnic groups and tribes that comprise the Cameroonian nation.

6.8 The State party rejects the author's contention (see para. 2.6 above) that there is no way of challenging laws considered incompatible with international human rights conventions. It first asserts that there are no laws which are incompatible with human rights principles; if there were, there would, under domestic laws, be several remedies against such laws. In this context, the State party refers to articles 20 and 27 of the Constitution of Cameroon, which lay down the principle that draft legislation incompatible with fundamental human rights principles would be repudiated by Parliament or by the Supreme Court. Furthermore, article 9 of Law 72/6 of 26 August 1972 governing the organization and functions of the Supreme Court stipulates that the Supreme Court is competent to adjudicate all disputes of a public law character brought against the State. The State party refers to a judgement handed down by the Supreme Court against the Government in April 1991 which concerned violations of the rights of the defence; this judgement confirms, in the State party's opinion, that remedies against legislative texts deemed incompatible with internationally accepted human rights standards are available and effective.

6.9 As to the allegations under articles 9 and 14, the State party submits that the examining magistrate who referred the author's case to a military tribunal in January 1989 did not exceed his competence and merely examined whether the evidence against the author justified his indictment. Concerning the author's allegation that he was not notified of the reasons for his arrest and that no warrant was served on him, the State party affirms that article 8 (2) of Law 72/5 of 26 August 1972, which governs this issue, was applied correctly.

6.10 In this context, it affirms that pursuant to the decision of the examining magistrate to refer the case to the military tribunal the author was not served with an arrest warrant but rather was remanded in custody ("l'auteur n'a pas fait l'objet d'un mandat d'arrêt mais plutôt d'un mandat de dépôt"). The decision of 25 January 1989 was duly notified to him. This decision, according to the State party, duly records all the charges against the author and the reasons for his arrest. Therefore, the notification of this decision to the author was compatible with the provisions of article 9 of the Covenant. Concerning the repeated postponements of the hearing of the case until 5 May 1989, the State party contends that they must be attributed to the author's requests for a competent legal representative, charged with his defence. The delays must therefore be attributed to Mr. Mukong. In respect of the second arrest (February 1990), the author was not served with an arrest warrant, but rather with a direct summons at the request of the Minister for Defense. There was therefore no arrest warrant to notify him of ("n'avait pas fait l'objet d'un mandat d'arrêt mais plutôt d'une citation directe à la requête du Ministre chargé de la Défense. Il n'y avait donc pas mandat d'arrêt à lui notifier à cet effet").

6.11 The State party reiterates its arguments detailed in paragraphs 6.9 and 6.10 above in the context of alleged violations of article 14, paragraphs 1 and 3. It further draws attention to the fact that the author himself argued that his acquittal by the military tribunal on 5 April 1990 proved that the judges considered him to be innocent. The State party wonders how, in the circumstances, a tribunal that acquitted the author can be qualified as partial and its judges subject to the influence of high government officials.

6.12 Finally, the State party contends that there is no basis for the author's allegation that he has been denied the right to return to his country (art. 12, para. 4). No law, regulation or decree contains a prohibition in this respect. It is submitted that Mr. Mukong left Cameroon of his own free will and is free to return whenever he wishes to do so.

7.1 In his comments, the author affirms that in respect of claims for compensation for ill-treatment or torture, there are still no appropriate or effective ways to seek redress in the domestic courts. Under the applicable laws, any such action necessitates the authorization of a Government authority, such as the Ministry of Justice or the Ministry of Defence. The author argues that the so-called "liberty laws" entrench arbitrary detention by administrative officers and continue to be used for human rights violations, and the courts cannot entertin actions arising from the application of these laws.

7.2 The author further contends that such treatment as he was subjected to in detention cannot be justified by the legitimacy of the sanction imposed against him, as in the first case (1988), the charges against him were withdrawn at the request of the Assistant Minister of Defence, and in the second case (1990), he was acquitted. He dismisses the State party's contention that conditions of detention are a factor of the underdevelopment of the country, and notes that if this argument were to be accepted, a country could always hide behind the excuse of being poor to justify perpetual human rights violations.

7.3 According to the author, the report of the National Centre for Studies and Research (see para. 6.3 above) is unreliable and "fabricated" and points out that, in fact, the report consists of no more than a written reply to some questions provided by the very individual who had threatened him at the camp in Douala.

7.4 The author indirectly confirms that domestic courts may entertain claims for damages for ill-treatment, but points out that the case referred to by the State party is still pending before the Supreme Court, although the appeal was filed in 1981. He thus questions the effectiveness of this type of remedy and the relevance of the judgments referred to by the State party.

7.5 The author appeals to the Committee to examine closely the so-called "liberty laws" of December 1990, and in particular:

(a) Decree 90-1459 of 8 November 1990 to set up a national commission on human rights and freedoms;

(b) Law 90-47 of 19 December 1990 relating to states of emergency;

(c) Law 90-52 of 19 December 1990 relating to the freedom of mass communication;

(d) Law 90-56 of 19 December 1990 relating to political parties;

(e) Law 90-54 of 19 December 1990 relating to the maintenance of law and order.

The author submits that all these laws fall far short of the requirements of the Universal Declaration of Human Rights and of the International Covenant on Civil and Political Rights.

7.6 The author challenges the State party's contention that he was himself responsible for the delay in the adjudication of his case in 1989. He affirms that he asked only once for a postponement of the hearing and was ready with his defence as of 9 February 1989. From that day onward, his lawyers attended the court sessions, as did observers from the British and American Embassies in Yaoundé. The author emphasizes that he did not request another adjournment.

7.7 Finally, the author observes that he was able to return to his country only as a result of "diplomatic action taken by some big powers interested in human rights". He notes that although he has not been molested openly for past activities, he was again arrested, together with other individuals fighting for multiparty democracy and human rights, on 15 October 1993 in the city of Kom. He claims that he and the others were transported under inhuman conditions to Bamenda, where they were released in the afternoon of 16 October 1993. Finally, the author notes that the ban on his book Prisoner without a Crime was lifted, apparently, after his complaint was filed with the Human Rights Committee. The book now circulates freely, but to argue, as is implied in the State party's observations on the merits of his complaint, that it was never banned, does not conform to the truth.

Revision of admissibility and examination of the merits

8.1 The Committee has taken note of the State party's request that the admissibility decision of 8 July 1992 be reviewed pursuant to rule 93, paragraph 4, of the rules of procedure, as well as of the author's comments thereon. It takes the opportunity to expand on its admissibility findings.

8.2 To the extent that the State party argues that for the purposes of article 5, paragraph 2 (b), of the Optional Protocol, domestic remedies must only be available and not also be effective, the Committee refers to its established jurisprudence, under which remedies which do not provide a reasonable prospect of success need not be exhausted for purposes of the Optional Protocol. It sees no reason to depart from this jurisprudence. Furthermore, it transpires from the State party's submission that the Government's arguments relate primarily to the merits of the author's allegations. If the State party were to contend that because there are no merits in Mr. Mukong's claims, they must also be deemed inadmissible, the Committee would observe that the State party's argument reveals a misconception of the procedure under the Optional Protocol, which distinguishes clearly between formal admissibility requirements and the substance of a complainant's allegations.

8.3 The State party has reiterated that the author still has not sought to avail himself of available remedies in respect of his allegations of ill-treatment. The Committee cannot share the State party's assessment. Firstly, the cases referred to by the State party concern offences different (such as the use of firearms, or abuse of office) from those of which the author complains. Secondly, the effectiveness of remedies against ill-treatment cannot be dissociated from the author's portrayal (uncontested and indeed confirmed by the State party) as a political opposition activist. Thirdly, the Committee notes that since his return, the author has continued to suffer specified forms of harassment on account of his political activities. Finally, it is uncontested that the case which the State party itself considers relevant to the author's situation has been pending before the Supreme Court of Cameroon for over 12 years. In the circumstances, the Committee questions the relevance of the jurisprudence and court decisions invoked by the State party for the author's particular case and concludes that there is no reason to revise the decision on admissibility in as much as the author's claim under article 7 is concerned.

8.4 *Mutatis mutandis*, the considerations in paragraph 8.3 above also apply to remedies in respect of the author's claims under articles 9, 14 and 19. The Committee refers in this context to its concluding comments on the second periodic report of Cameroon, adopted on 7 April 1994. [a]

8.5 On balance, while appreciating the State party's further clarifications about the availability of judicial remedies for the author's claims, the Committee sees no reason to revise its decision on admissibility of 8 July 1992.

9.1 The author has contended that the conditions of his detention in 1988 and 1990 amount to a violation of article 7, in particular because of insalubrious conditions of detention facilities, overcrowding of a cell at the first police district of Yaoundé, deprivation of food and of clothing, and death threats and incommunicado detention at the camp of the brigade mobile mixte at Douala. The State party has replied that the burden of proof for these allegations lies with the author, and that as far as conditions of detention are concerned, they are a factor of the underdevelopment of Cameroon.

9.2 The Committee does not accept the State party's views. As it has held on previous occasions, the burden of proof cannot rest alone with the author of a communication, especially considering that the author and the State party do not always have equal access to the evidence and that frequently the State party alone has access to the relevant information. b/ Mr. Mukong has provided detailed information about the treatment he was subjected to; in the circumstances, it was incumbent upon the State party to refute the allegations in detail, rather than shifting the burden of proof to the author.

9.3 As to the conditions of detention in general, the Committee observes that certain minimum standards regarding the conditions of detention must be observed regardless of a State party's level of development. These include, in accordance with rules 10, 12, 17, 19 and 20 of the Standard Minimum Rules for the Treatment of Prisoners, c/ minimum floor space and cubic content of air for each prisoner, adequate sanitary facilities, clothing which shall be in no manner degrading or humiliating, provision of a separate bed and provision of food of nutritional value adequate for health and strength. It should be noted that these are minimum requirements which the Committee considers should always be observed, even if economic or budgetary considerations may make compliance with these obligations difficult. It transpires from the file that these requirements were not met during the author's detention in the summer of 1988 and in February/March 1990.

9.4 The Committee further notes that quite apart from the general conditions of detention, the author has been singled out for exceptionally harsh and degrading treatment. Thus, he was kept detained incommunicado, was threatened with torture and death and intimidated, deprived of food, and kept locked in his cell for several days on end without the possibility of recreation. In this context, the Committee recalls its general comment 20 (44) which recommends that States parties should make provision against incommunicado detention and notes that total isolation of a detained or imprisoned person may amount to acts prohibited by article 7. d/ In view of the above, the Committee finds that Mr. Mukong has been subjected to cruel, inhuman and degrading treatment, in violation of article 7 of the Covenant.

9.5 The author has claimed a violation of article 14, although in the first case (1988-1989), the charges against him were withdrawn, and in the second case (1990), he was acquitted. It is implicit in the State party's submission that in the light of these events, it considers the complaint under article 14 moot. The Committee notes that in the first case, it was the Assistant Minister of Defence and thus a government official who ordered the closure of the proceedings against the author on 4 May 1989. In the second case, the author was formally acquitted. However, although there is evidence that government officials intervened in the proceedings in the first case, it cannot be said that the author's rights under article 14 were not respected. Similar considerations apply to the second case. The author has also claimed, and the State party refuted, a violation of article 14, paragraphs 3 (a) and (b). The Committee has carefully examined the material provided by the parties and concludes that in the instant case, the author's right to a fair trial has not been violated.

9.6 The author has claimed a violation of his right to freedom of expression and opinion, as he was persecuted for his advocacy of multi-party democracy and the expression of opinions inimical to the Government of the State party. The State party has replied that restrictions on the author's freedom of expression were justified under the terms of article 19, paragraph 3.

9.7 Under article 19, everyone shall have the right to freedom of expression. Any restriction of the freedom of expression pursuant to paragraph 3 of article 19 must cumulatively meet the following conditions: it must be provided for by law, it must address one of the aims enumerated in paragraphs 3 (a) and (b) of article 19 and it must be necessary to achieve the legitimate purpose. The State party has indirectly justified its actions on grounds of national security and/or public order by arguing that the author's right to freedom of expression was exercised without regard to the country's political context and continued struggle for unity. While the State party has indicated that the restrictions on the author's freedom of expression were provided for by law, it must still be determined whether the measures taken against the author were necessary for the safeguard of national security and/or public order. The Committee considers that it was not necessary to safeguard an alleged vulnerable state of national unity by subjecting the author to arrest, continued detention and treatment in violation of article 7. It further considers that the legitimate objective of safeguarding and indeed strengthening national unity under difficult political circumstances cannot be achieved by attempting to muzzle advocacy of multi-party democracy, democratic tenets and human rights. In this regard, the question of deciding which measures might meet the "necessity" test in such situations does not arise. In the circumstances of the author's case, the Committee concludes that there has been a violation of article 19 of the Covenant.

9.8 The Committee notes that the State party has dismissed the author's claim under article 9 by indicating that he was arrested and detained in application of the rules of criminal procedure, and that the police detention and preliminary enquiries by the examining magistrate were compatible with article 9. It remains however to be determined whether other factors may render an otherwise lawful arrest and lawful detention "arbitrary" within the meaning of article 9. The drafting history of article 9, paragraph 1, confirms that "arbitrariness" is not to be equated with "against the law", but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law. As the Committee has observed on a previous occasion, this means that remand in custody pursuant to lawful arrest must not only be lawful but reasonable in all the circumstances. e/ Remand in custody must further be necessary in all the circumstances, for example, to prevent flight, interference with evidence or the recurrence of crime. In the present case, the State party has not shown that any of these factors was present. It has merely contended that the author's arrest and detention were clearly justified by reference to article 19, paragraph 3, i.e. permissible restrictions on the author's freedom of expression. In line with the arguments developed in paragraph 9.6 above, the Committee finds that the author's detention in 1988-1989 and 1990 was neither reasonable nor necessary in the circumstances of the case, and thus in violation of article 9, paragraph 1, of the Covenant.

9.9 The author has formulated claims under article 9, paragraphs 2 to 4, to the effect that he was not promptly informed of the reasons for his arrest(s) and the charges against him, that he was not brought promptly before a judge or other officer authorized by law to exercise judicial power, and that he was denied the right to challenge the lawfulness of his detention. The State party has denied these charges by submitting that the author was properly notified of the charges against him and brought to trial as expeditiously as possible (see para. 6.10 above). The Committee notes that the material and evidence before it does not suffice to make a finding in respect of these claims.

9.10 Finally, as to the claim under article 12, paragraph 4, the Committee notes that the author was not forced into exile by the State party's authorities in the summer of 1990, but left the country voluntarily, and that no laws or regulations or State practice prevented him from returning to Cameroon. As the author himself concedes, he was able to return to his country in April 1992; even if it may be that his return was made possible or facilitated by diplomatic intervention, this does not change the Committee's conclusion that there has been no violation of article 12, paragraph 4, in the case.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the opinion that the facts before it reveal violations by Cameroon of articles 7, 9, paragraph 1, and 19 of the Covenant.

11. Under article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide Mr. Albert W. Mukong with an effective remedy. The Committee urges the State party to grant Mr. Mukong appropriate compensation for the treatment he has been subjected to, to investigate his allegations of ill-treatment in detention, to respect his rights under article 19 of the Covenant and to ensure that similar violations do not occur in the future.

12. The Committee would wish to receive from the State party, within 90 days, information on any relevant measures taken by the State party in respect of the Committee's views.

[Adopted in English, French and Spanish, the English text being the original version.]

Notes

a/ See CCPR/C/79/Add.33 (18 April 1994), paras. 21 and 22.

b/ See Official Records of the General Assembly, Thirty-seventh Session, Supplement No. 40 (A/37/40), annex X, communication No. 30/1978 (Bleier v. Uruguay), views adopted on 29 March 1982, para. 13.3.

c/ Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council in its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977; see Human Rights: A Compilation of International Instruments (United Nations publication, Sales No. 88.XIV.1), chap. G, sect. 30.

d/ See Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40 (A/47/40), annex VI.A, general comment 20 (44).

e/ Ibid., Forty-fifth Session, Supplement No. 40 (A/45/40), annex IX.M, communication No. 305/1988 (Hugo van Alphen v. the Netherlands), views adopted on 23 July 1990, para. 5.8.

BB. Communication No. 468/1991, Angel N. Oló Bahamonde v. Equatorial Guinea (views adopted on 20 October 1993, forty-ninth session)

Submitted by: Angel N. Oló Bahamonde

Victim: The author

State party: Equatorial Guinea

Date of communication: 11 June 1991 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 20 October 1993,

Having concluded its consideration of communication No. 468/1991, submitted to the Human Rights Committee by Mr. Angel N. Oló Bahamonde under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts its views under article 5, paragraph 4, of the Optional Protocol.

The facts as submitted by the author

1. The author of the communication is Angel N. Oló Bahamonde, a citizen of Equatorial Guinea born in 1944 and a landowner, mining engineer and former civil servant. Until the summer of 1991, he resided in Malabo, Equatorial Guinea. In September 1991, he fled the country for Spain. He currently resides in Luanco, Spain. The author claims to be a victim of violations by Equatorial Guinea of articles 6, paragraph 1; 9; 12; 14; 16; 17; 19; 20, paragraph 2; 25; 26; and 27, in conjunction with article 2 of the International Covenant on Civil and Political Rights.

2.1 On 4 March 1986, the author's passport was confiscated at the airport of Malabo; on 26 March 1986, the same thing occurred at the airport of Libreville, Gabon, allegedly upon orders of President Obiang of Equatorial Guinea. From 26 May to 17 June 1987, the author was detained by order of the Governor of Bioko. Some of his lands were confiscated in October 1987. The author complained to the authorities and directly to President Obiang, to no avail. A little later, some 22.2 tons of cacao from his plantations were confiscated by order of the Prime Minister, and his objections and recourse of 28 February 1988 were simply ignored. Part of his agricultural crops allegedly were destroyed by the military in 1990-1991. Once again, his requests for compensation were not acted upon.

2.2 On 16 January 1991, the author was granted a personal audience with President Obiang. In its course, the author outlined his grievances and handed to Mr. Obiang a copy of the entire written record in the case, including copies of the complaints addressed to the President. The damage allegedly suffered included the expropriation of several of his farms by virtue of decree No. 125/1990 of 13 November 1990, the destruction of maize and soja crops worth more than 5 million CFA francs, and the exploitation of timberland in the order of approximately 5 million CFA francs. Finally, industrial development and oil exploration projects prepared by him for the Government and valued at approximately 835 million CFA francs have been used by the authorities without any payment to the author.

2.3 According to the author, there are no effective domestic remedies to exhaust or even pursue, as President Obiang controls the State party's judiciary at all levels of the administration.

The complaint

3.1 The author complains that he and other individuals who do not share the views or adhere to the ruling party of President Obiang or who do not at least belong to his clan (the Mongomo clan) are subjected to varying degrees of discrimination, intimidation and persecution. More particularly, the author claims to have been a victim of systematic persecution by the Prime Minister, the Deputy Prime Minister, the Governor of Bioko (North) and the Minister of External Relations, all of whom, through their respective services, have pronounced threats against him, primarily on account of his outspoken views on the regime in place. He further contends that the ambassadors of Equatorial Guinea in Spain, France and Gabon have been instructed to "make his life difficult" whenever he travels abroad.

3.2 The author asserts that his arrest in May-June 1987 was arbitrary, and that no indictment was served on him throughout the period of his detention. During this period, he was not brought before a judge or judicial officer.

3.3 It is further submitted that the author has been prevented from travelling freely within his own country and from leaving it at his own free will.

The State party's information and observations and the author's comments thereon

4.1 The State party notes that the author has failed to exhaust available domestic remedies, since he did not file any action before the local civil or administrative courts. It adds, in general terms, that there is no basis for the author's assertion that the judicial organs in Equatorial Guinea are manipulated by the Government and by President Obiang.

4.2 The State party submits that the author could invoke, before the domestic tribunals, the following laws and/or regulations, which the courts are bound to apply:

(a) The Basic Law of Equatorial Guinea of 15 August 1982;

(b) Law No.10/1984 on the organization of the judiciary;

(c) Decree No. 28/1980 of 11 November 1980, governing the procedure before administrative judicial instances;

(d) Decree No. 4/1980 of 3 April 1980, which regulates the subsidiary application of old Spanish laws and regulations which were applicable in Equatorial Guinea until 12 October 1968.

The State party does not relate this information to the specific circumstances of the author's case.

5.1 In his comments, the author challenges the State party's arguments and forwards copies of his numerous démarches, administrative, judicial or otherwise, to obtain judicial redress, adding that all the avenues of redress that in the State party's opinion are open to him have been systematically blocked by the authorities and President Obiang himself. In this context, it is submitted that the judiciary in Equatorial Guinea cannot act independently and impartially, since all judges and magistrates are directly nominated by the President, and that the president of the Court of Appeal himself is a member of the President's security forces.

5.2 The author contends that, since his departure from Equatorial Guinea in 1991, he has received death threats. He claims that the security services of Equatorial Guinea have received the order to eliminate him, if necessary in Spain. In this context, he argues that his departure from Malabo was only possible with the protection and the help offered by a German citizen. Moreover, since 29 September 1991, all his remaining properties in Equatorial Guinea are said to have been systematically dismantled or expropriated.

The Committee's decision on admissibility

6.1 During its forty-fourth session, in March 1992, the Committee considered the admissibility of the communication. The Committee took note of the State party's contention that domestic remedies were available to the author and of the author's challenge to this affirmation. It recalled that it is implicit in rule 91 of its rules of procedure and article 4, paragraph 2, of the Optional Protocol, that a State party to the Covenant should make available to the Committee all the information at its disposal, including, at the stage of determination of the admissibility of the communication, detailed information about remedies available to the victims of the alleged violation in the circumstances of their cases. Taking into consideration the State party's failure to link its observations to the specific circumstances of the author's case, and bearing in mind that he had submitted very comprehensive information in support of his contention that he sought to avail himself of remedies under the laws of the State party, the Committee was satisfied that he had met the requirements of article 5, paragraph 2 (b), of the Optional Protocol.

6.2 As to the allegations under articles 16; 17; 19; 20, paragraph 2; 25; and 27, the Committee considered that the author had failed to substantiate them for purposes of admissibility. Similarly, it noted that he had failed to adduce sufficient evidence in support of his claim under article 6, paragraph 1, and concluded that in this respect, he had failed to advance a claim within the meaning of article 2 of the Optional Protocol.

6.3 On 25 March 1992, the Committee declared the communication admissible in so far as it appeared to raise issues under articles 9, paragraphs 1 and 3; 12, paragraphs 1 and 2; 14, paragraph 1; and 26 of the Covenant.

The State party's further observations and comments

7.1 In a submission of 30 July 1992, the State party reaffirms that its earlier submission made in respect of the admissibility of the case was "sufficiently detailed, honest and reflective of the truth on this matter". It admits that its version cannot be reconciled with that of the author.

7.2 The State party notes that it will not add anything further in terms of clarifications or documentation and suggests that if the Committee intends to seek to obtain a clearer picture of the author's allegations, it should investigate in situ the "well-founded submissions of the State party and the allegations of the author". The State party indicates that it is willing to facilitate a fact-finding mission by the Committee and to provide all the necessary guarantees.

7.3 In a further submission dated 30 June 1993, the State party summarily dismisses all of the author's allegations as unfounded and alleges that Mr. Bahamonde suffers from a "persecution complex" ("obsesionado por su manía persecutoria"). It contends that far from being harassed and persecuted, the author owed both his high functions in the civil service of Equatorial Guinea and his promotions to President Obiang himself, and that he left his functions of his own free will. Accordingly, the State party contends that it does not owe the author anything in terms of compensation and submits that on the contrary, it could well prosecute the author for defamation, abuse of office and for treason.

7.4 The State party asserts that there is no basis for the author's contention of systematic political repression and an undemocratic system of government in Equatorial Guinea, nor for the assertion that the administration of justice is at the mercy of the executive and insensitive to considerations, for example, of due process. On the contrary, more than 13 political parties were legalized in March 1993, and they are said to be able to operate without restrictions. In the circumstances, the State party requests the Committee to reject the author's submissions as an abuse of the right of submission, under article 3 of the Optional Protocol.

Examination of the merits

8.1 The Committee has taken note of the State party's observations, which reject the author's allegations in summary terms and invite the Committee to ascertain in situ that there have been no violations of the Covenant.

8.2 As to the State party's suggestion that the Committee should investigate the author's allegations in Equatorial Guinea, the Committee recalls that pursuant to article 5, paragraph 1, of the Optional Protocol, it considers communications "on the basis of all written information made available to it by the individual and by the State party concerned". The Committee has no choice but to confine itself to formulating its views in the present case on the basis of the written information received. Article 4, paragraph 2, of the Optional Protocol enjoins a State party to investigate thoroughly, in good faith and within the imparted deadlines, all the allegations of violations of the Covenant made against it, and to make available to the Committee in written form all the information at its disposal. This the State party has failed to do; in particular, it has not addressed the substance of the author's claims under articles 9, 12, 14 or 26, the provisions in respect of which the communication had been declared admissible. Rather, it simply rejected them in general terms as unfounded. Accordingly, due weight must be given to the author's allegations, to the extent that they have been substantiated.

9.1 With respect to the author's allegation that he was arbitrarily arrested and detained between 26 May and 17 June 1986, the Committee notes that the State party has not contested this claim and merely indicated that the author could have availed himself of judicial remedies. In the circumstances, the Committee considers that the author has substantiated his claim and concludes that he was subjected to arbitrary arrest and detention, in violation of article 9, paragraph 1. It further concludes that as the author was not brought promptly before a judge or other officer authorized by law to exercise judicial power, the State party has failed to comply with its obligations under article 9, paragraph 3.

9.2 With regard to the author's claim that he was subjected to harassment, intimidation and threats by prominent politicians and their respective services on a number of occasions, the Committee observes that the State party has dismissed the claim in general terms, without addressing the author's well-substantiated allegations against several members of the Government of President Obiang Nguema. The first sentence of article 9, paragraph 1, guarantees to everyone the right to liberty and security of person. The Committee has already had the opportunity to explain that this right may be invoked not only in the context of arrest and detention, and that an interpretation of article 9 which would allow a State party to ignore threats to the personal security of non-detained persons within its jurisdiction would render ineffective the guarantees of the Covenant. a/ In the circumstances of the case, the Committee concludes that the State party has failed to ensure Mr. Oló Bahamonde's right to security of person, in violation of article 9, paragraph 1.

9.3 The author has claimed, and the State party has not denied, that his passport was confiscated on two occasions in March 1986, and that he was denied the right to leave his country of his own free will. This, in the Committee's opinion, amounts to a violation of article 12, paragraphs 1 and 2, of the Covenant.

9.4 The author has contended that despite several attempts to obtain judicial redress before the courts of Equatorial Guinea, all of his démarches have been unsuccessful. This claim has been refuted summarily by the State party, which argued that the author could have invoked specific legislation before the courts, without however linking its argument to the circumstances of the case. The Committee observes that the notion of equality before the courts and tribunals encompasses the very access to the courts, and that a situation in which an individual's attempts to seize the competent jurisdictions of his/her grievances are systematically frustrated runs counter to the guarantees of article 14, paragraph 1. In this context, the Committee has also noted the author's contention that the President of the State party controls the judiciary in Equatorial Guinea. The Committee considers that a situation where the functions and competences of the judiciary and the executive are not clearly distinguishable or where the latter is able to control or direct the former is incompatible with the notion of an independent and impartial tribunal within the meaning of article 14, paragraph 1, of the Covenant.

9.5 Finally, on the basis of the information before it, the Committee concludes that Mr. Oló Bahamonde has been discriminated against because of his political opinions and his open criticism of, and opposition to, the Government and the ruling political party, in violation of article 26 of the Covenant.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it reveal violations of articles 9, paragraphs 1 and 3; 12, paragraphs 1 and 2; 14, paragraph 1; and 26 of the Covenant.

11. Pursuant to article 2 of the Covenant, the State party is under an obligation to provide Mr. Oló Bahamonde with an appropriate remedy. The Committee urges the State party to guarantee the security of his person, to return confiscated property to him or to grant him appropriate compensation, and that the discrimination to which he has been subjected be remedied without delay.

12. The Committee would wish to receive information, within 90 days, on any measures taken by the State party in respect of the Committee's views.

[Done in English, French and Spanish, the English text being the original version.]

Notes

a/ Official Records of the General Assembly, Forty-fifth Session, Supplement No. 40 (A/45/40), annex IX.D, Communication No. 195/1985 (Delgado Páez v. Colombia), views adopted on 12 July 1990, paras. 5.5 and 5.6; and ibid., Forty-eighth Session, Supplement No. 40 (A/48/40), annex XII.I, communication No. 314/1988 (Bwalya v. Zambia), views adopted on 14 July 1993, para. 6.4.

CC. Communication No. 469/1991, Charles Chitat Ng v. Canada (views adopted on 5 November 1993, forty-ninth session)*

Submitted by: Charles Chitat Ng (represented by counsel)

Victim: The author

State party: Canada

Date of communication: 25 September 1991 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 5 November 1993,

Having concluded its consideration of communication No. 469/1991, submitted to the Human Rights Committee on behalf of Mr. Charles Chitat Ng under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, his counsel and the State party,

Adopts its views under article 5, paragraph 4, of the Optional Protocol.

The facts as submitted by the author

1. The author of the communication is Charles Chitat Ng, a British subject, born on 24 December 1960 in Hong Kong, and a resident of the United States of America, at the time of his submission detained in a penitentiary in Alberta, Canada, and on 26 September 1991 extradited to the United States. He claims to be a victim of a violation of his human rights by Canada because of his extradition. He is represented by counsel.

2.1 The author was arrested, charged and convicted in 1985 in Calgary, Alberta, following an attempted store theft and shooting of a security guard. In February 1987, the United States formally requested the author's extradition to stand trial in California on 19 criminal counts, including kidnapping and 12 murders, committed in 1984 and 1985. If convicted, the author could face the death penalty.

2.2 In November 1988, a judge of the Alberta Court of Queen's Bench ordered the author's extradition. In February 1989, the author's habeas corpus application was denied, and on 31 August 1989 the Supreme Court of Canada refused the author leave to appeal.

2.3 Article 6 of the Extradition Treaty between Canada and the United States provides:

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* The texts of eight individual opinions, submitted by nine Committee members, are appended.

> "When the offence for which extradition is requested is punishable by death under the laws of the requesting State and the laws of the requested State do not permit such punishment for that offence, extradition may be refused, unless the requesting State provides such assurances as the requested State considers sufficient that the death penalty shall not be imposed or, if imposed, shall not be executed."

Canada abolished the death penalty in 1976, except for certain military offences.

2.4 The power to seek assurances that the death penalty will not be imposed is discretionary and is conferred on the Minister of Justice pursuant to section 25 of the Extradition Act. In October 1989, the Minister of Justice decided not to seek these assurances.

2.5 The author subsequently filed an application for review of the Minister's decision with the Federal Court. On 8 June 1990, the issues in the case were referred to the Supreme Court of Canada, which rendered judgement on 26 September 1991. It found that the author's extradition without assurances as to the imposition of the death penalty did not contravene Canada's constitutional protection for human rights nor the standards of the international community. The author was extradited on the same day.

The complaint

3. The author claims that the decision to extradite him violates articles 6, 7, 9, 10, 14 and 26 of the Covenant. He submits that the execution of the death sentence by gas asphyxiation, as provided for under California statutes, constitutes cruel and inhuman treatment or punishment *per se*, and that the conditions on death row are cruel, inhuman and degrading. He further alleges that the judicial procedures in California, inasmuch as they relate specifically to capital punishment, do not meet basic requirements of justice. In this context, the author alleges that in the United States, racial bias influences the imposition of the death penalty.

The State party's initial observations and the author's comments thereon

4.1 The State party submits that the communication is inadmissible *ratione personae*, *loci* and *materiae*.

4.2 It is argued that the author cannot be considered a victim within the meaning of the Optional Protocol, since his allegations are derived from assumptions about possible future events, which may not materialize and which are dependent on the law and actions of the authorities of the United States. The State party refers in this connection to the Committee's views in communication No. 61/1979, a/ where it was found that the Committee "has only been entrusted with the mandate of examining whether an individual has suffered an actual violation of his rights. It cannot review in the abstract whether national legislation contravenes the Covenant".

4.3 The State party indicates that the author's allegations concern the penal law and judicial system of a country other than Canada. It refers to the Committee's inadmissibility decision in communication No. 217/1986, b/ where the Committee observed that "it can only receive and consider communications in respect of claims that come under the jurisdiction of a State party to the Covenant". The State party submits that the Covenant does not impose responsibility upon a State for eventualities over which it has no jurisdiction.

4.4 Moreover, it is submitted that the communication should be declared inadmissible as incompatible with the provisions of the Covenant, since the Covenant does not provide for a right not to be extradited. In this connection, the State party quotes from the Committee's inadmissibility decision in communication No. 117/1981: c/ "There is no provision of the Covenant making it unlawful for a State party to seek extradition of a person from another country". It further argues that even if extradition could be found to fall within the scope of protection of the Covenant in exceptional circumstances, these circumstances are not present in the instant case.

4.5 The State party further refers to the United Nations Model Treaty on Extradition, d/ which clearly contemplates the possibility of extradition without conditions by providing for discretion in obtaining assurances regarding the death penalty in the same fashion as is found in article 6 of the Extradition Treaty between Canada and the United States. It concludes that interference with the surrender of a fugitive pursuant to legitimate requests from a treaty partner would defeat the principles and objects of extradition treaties and would entail undesirable consequences for States refusing these legitimate requests. In this context, the State party points out that its long, unprotected border with the United States would make it an attractive haven for fugitives from United States justice. If these fugitives could not be extradited because of the theoretical possibility of the death penalty, they would be effectively irremovable and would have to be allowed to remain in the country, unpunished and posing a threat to the safety and security of the inhabitants.

4.6 The State party finally submits that the author has failed to substantiate his allegations that the treatment he may face in the United States will violate his rights under the Covenant. In this connection, the State party points out that the imposition of the death penalty is not *per se* unlawful under the Covenant. As regards the delay between the imposition and the execution of the death sentence, the State party submits that it is difficult to see how a period of detention during which a convicted prisoner would pursue all avenues of appeal, can be held to constitute a violation of the Covenant.

5.1 In his comments on the State party's submission, counsel submits that the author is and was himself actually and personally affected by the decision of the State party to extradite him and that the communication is therefore admissible *ratione personae*. In this context, he refers to the Committee's views in communication No. 35/1978, e/ and argues that an individual can claim to be a victim within the meaning of the Optional Protocol if the laws, practices, actions or decisions of a State party raise a real risk of violation of rights set forth in the Covenant.

5.2 Counsel further argues that, since the decision complained of is one made by Canadian authorities while the author was subject to Canadian jurisdiction, the communication is admissible *ratione loci*. In this connection, he refers to the Committee's views in communication No. 110/1981, f/ where it was held that article 1 of the Covenant was "clearly intended to apply to individuals subject to the jurisdiction of the State party concerned *at the time of the alleged violation* of the Covenant" (emphasis added).

5.3 Counsel finally stresses that the author does not claim a right not to be extradited; he only claims that he should not have been surrendered without assurances that the death penalty would not be imposed. He submits that the communication is therefore compatible with the provisions of the Covenant. He refers in this context to the Committee's views on communication

No. 107/1981, g/ where the Committee found that anguish and stress can give rise to a breach of the Covenant; he submits that this finding is also applicable in the instant case.

The Committee's consideration of and decision on admissibility

6.1 During its forty-sixth session, in October 1992, the Committee considered the admissibility of the communication. It observed that extradition as such is outside the scope of application of the Covenant, h/ but that a State party's obligations in relation to a matter itself outside the scope of the Covenant may still be engaged by reference to other provisions of the Covenant. i/ The Committee noted that the author does not claim that extradition as such violates the Covenant, but rather that the particular circumstances related to the effects of his extradition would raise issues under specific provisions of the Covenant. Accordingly, the Committee found that the communication was thus not excluded ratione materiae.

6.2 The Committee considered the contention of the State party that the claim is inadmissible ratione loci. Article 2 of the Covenant requires States parties to guarantee the rights of persons within their jurisdiction. If a person is lawfully expelled or extradited, the State party concerned will not generally have responsibility under the Covenant for any violations of that person's rights that may later occur in the other jurisdiction. In that sense, a State party clearly is not required to guarantee the rights of persons within another jurisdiction. However, if a State party takes a decision relating to a person within its jurisdiction, and the necessary and foreseeable consequence is that this person's rights under the Covenant will be violated in another jurisdiction, the State party itself may be in violation of the Covenant. That follows from the fact that a State party's duty under article 2 of the Covenant would be negated by the handing over of a person to another State (whether a State party to the Covenant or not) where treatment contrary to the Covenant is certain or is the very purpose of the handing over. For example, a State party would itself be in violation of the Covenant if it handed over a person to another State in circumstances in which it was foreseeable that torture would take place. The foreseeability of the consequence would mean that there was a present violation by the State party, even though the consequence would not occur until later on.

6.3 The Committee therefore considered itself, in principle, competent to examine whether the State party is in violation of the Covenant by virtue of its decision to extradite the author under the Extradition Treaty of 1976 between Canada and the United States, and the Extradition Act of 1985.

6.4 The Committee observed that pursuant to article 1 of the Optional Protocol, the Committee may only receive and consider communications from individuals subject to the jurisdiction of a State party to the Covenant and to the Optional Protocol "who claim to be victims of a violation by that State party of any of their rights set forth in the Covenant". It considered that in the instant case, only the consideration of the merits of the circumstances under which the extradition procedure and all its effects occurred, would enable the Committee to determine whether the author is a victim within the meaning of article 1 of the Optional Protocol. Accordingly, the Committee found it appropriate to consider this issue, which concerned the admissibility of the communication, together with the examination of the merits of the case.

7. On 28 October 1992, the Human Rights Committee therefore decided to join the question of whether the author was a victim within the meaning of article 1

of the Optional Protocol to the consideration of the merits. The Committee expressed its regret that the State party had not acceded to the Committee's request, under rule 86, to stay extradition of the author.

The State party's further submission on the admissibility and the merits of the communication

8.1 In its submission dated 14 May 1993, the State party elaborates on the extradition process in general, on the Canada-United States extradition relationship and on the specifics of the present case. It also submits comments with respect to the admissibility of the communication, in particular with respect to article 1 of the Optional Protocol.

8.2 The State party recalls that:

> "... extradition exists to contribute to the safety of the citizens and residents of States. Dangerous criminal offenders seeking a safe haven from prosecution or punishment are removed to face justice in the State in which their crimes were committed. Extradition furthers international cooperation in criminal justice matters and strengthens domestic law enforcement. It is meant to be a straightforward and expeditious process. Extradition seeks to balance the rights of fugitives with the need for the protection of the residents of the two States parties to any given extradition treaty. The extradition relationship between Canada and the United States dates back to 1794 ... In 1842, the United States and Great Britain entered into the Ashburton-Webster Treaty, which contained articles governing the mutual surrender of criminals ... This treaty remained in force until the present Canada-United States Extradition Treaty of 1976".

8.3 With regard to the principle aut dedere aut judicare, the State party explains that while some States can prosecute persons for crimes committed in other jurisdictions in which their own nationals are either the offender or the victim, other States, such as Canada and certain other States in the common law tradition, cannot.

8.4 Extradition in Canada is governed by the Extradition Act and the terms of the applicable treaty. The Canadian Charter of Rights and Freedoms, which forms part of the constitution of Canada and embodies many of the rights protected by the Covenant, applies. Under Canadian law, extradition is a two-step process. The first involves a hearing at which a judge considers whether a factual and legal basis for extradition exists. The person sought for extradition may submit evidence at the judicial hearing. If the judge is satisfied with the evidence that a legal basis for extradition exists, the fugitive is ordered committed to await surrender to the requesting State. Judicial review of a warrant of committal to await surrender can be sought by means of an application for a writ of habeas corpus in a provincial court. A decision of the judge on the habeas corpus application can be appealed to the provincial court of appeal and then, with leave, to the Supreme Court of Canada. The second step in the extradition process begins following the exhaustion of the appeals in the judicial phase. The Minister of Justice is charged with the responsibility of deciding whether to surrender the person sought for extradition. The fugitive may make written submissions to the Minister, and counsel for the fugitive, with leave, may appear before the Minister to present oral argument. In coming to a decision on surrender, the Minister considers a complete record of the case from the judicial phase, together with any written and oral submissions from the fugitive, and while the Minister's decision is discretionary, the discretion is circumscribed by law. The decision is based upon a consideration of many factors, including Canada's obligations under the applicable treaty of extradition, facts particular to the person and the nature of the crime for which extradition is sought. In addition, the Minister must consider the terms of the Canadian Charter of Rights and Freedoms and the various instruments, including the Covenant, which outline Canada's international human rights obligations. Finally, a fugitive may seek judicial review of the Minister's decision by a provincial court and appeal a warrant of surrender, with leave, up to the Supreme Court of Canada. In interpreting Canada's human rights obligations under the Canadian Charter, the Supreme Court of Canada is guided by international instruments to which Canada is a party, including the Covenant.

8.5 With regard to surrender in capital cases, the Minister of Justice decides whether or not to request assurances to the effect that the death penalty should not be imposed or carried out on the basis of an examination of the particular facts of each case. The Extradition Treaty between Canada and the United States was not intended to make the seeking of assurances a routine occurrence; rather, assurances had to be sought only in circumstances where the particular facts of the case warrant a special exercise of discretion.

8.6 With regard to the abolition of the death penalty in Canada, the State party notes that:

> "... certain States within the international community, including the United States, continue to impose the death penalty. The Government of Canada does not use extradition as a vehicle for imposing its concepts of criminal law policy on other States. By seeking assurances on a routine basis, in the absence of exceptional circumstances, Canada would be dictating to the requesting State, in this case the United States, how it should punish its criminal law offenders. The Government of Canada contends that this would be an unwarranted interference with the internal affairs of another State. The Government of Canada reserves the right ... to refuse to extradite without assurances. This right is held in reserve for use only where exceptional circumstances exist. In the view of the Government of Canada, it may be that evidence showing that a fugitive would face certain or foreseeable violations of the Covenant would be one example of exceptional circumstances which would warrant the special measure of seeking assurances under article 6. However, the evidence presented by Ng during the extradition process in Canada (which evidence has been submitted by counsel for Ng in this communication) does not support the allegations that the use of the death penalty in the United States generally, or in the State of California in particular, violates the Covenant".

8.7 The State party also refers to article 4 of the United Nations Model Treaty on Extradition, which lists optional, but not mandatory, grounds for refusing extradition:

> "(d) If the offence for which extradition is requested carries the death penalty under the law of the Requesting State, unless the State gives such assurance as the Requested State considers sufficient that the death penalty will not be imposed or, if imposed, will not be carried out."

Similarly, article 6 of the Extradition Treaty between Canada and the United States provides that the decision with respect to obtaining assurances regarding the death penalty is discretionary.

8.8 With regard to the link between extradition and the protection of society, the State party submits that Canada and the United States share a

4,800 kilometre unguarded border, that many fugitives from United States justice cross that border into Canada and that in the last 12 years there has been a steadily increasing number of extradition requests from the United States. In 1980, there were 29 such requests; by 1992, the number had increased to 88.

> "Requests involving death penalty cases are a new and growing problem for Canada ... a policy of routinely seeking assurances under article 6 of the Canada-United States Extradition Treaty will encourage even more criminal law offenders, especially those guilty of the most serious crimes, to flee the United States for Canada. Canada does not wish to become a haven for the most wanted and dangerous criminals from the United States. If the Covenant fetters Canada's discretion not to seek assurances, increasing numbers of criminals may come to Canada for the purpose of securing immunity from capital punishment."

9.1 With regard to Mr. Ng's case, the State party recalls that he challenged the warrant of committal to await surrender in accordance with the extradition process outlined above, and that his counsel made written and oral submissions to the Minister to seek assurances that the death penalty would not be imposed. He argued that extradition to face the death penalty would offend his rights under section 7 (comparable to articles 6 and 9 of the Covenant) and section 12 (comparable to article 7 of the Covenant) of the Canadian Charter of Rights and Freedoms. The Supreme Court heard Mr. Ng's case at the same time as the appeal by Mr. Kindler, an American citizen who also faced extradition to the United States on a capital charge, j/ and decided that their extradition without assurances would not violate Canada's human rights obligations.

9.2 With regard to the admissibility of the communication, the State party once more reaffirms that the communication should be declared inadmissible *ratione materiae* because extradition *per se* is beyond the scope of the Covenant. A review of the *travaux préparatoires* reveals that the drafters of the Covenant specifically considered and rejected a proposal to deal with extradition in the Covenant. In the light of the negotiating history of the Covenant, the State party submits that:

> "... a decision to extend the Covenant to extradition treaties or to individual decisions pursuant thereto would stretch the principles governing the interpretation of human rights instruments in unreasonable and unacceptable ways. It would be unreasonable because the principles of interpretation which recognize that human rights instruments are living documents and that human rights evolve over time cannot be employed in the face of express limits to the application of a given document. The absence of extradition from the articles of the Covenant when read with the intention of the drafters must be taken as an express limitation".

9.3 The State party further contends that Mr. Ng has not submitted any evidence that would suggest that he was a victim of any violation in Canada of rights set forth in the Covenant. In this context, the State party notes that the author merely claims that his extradition to the United States was in violation of the Covenant because he faces charges in the United States which may lead to his being sentenced to death if found guilty. The State party submits that it satisfied itself that the foreseeable treatment of Mr. Ng in the United States would not violate his rights under the Covenant.

10.1 On the merits, the State party stresses that Mr. Ng enjoyed a full hearing on all matters concerning his extradition to face the death penalty.

> "If it can be said that the Covenant applies to extradition at all ... an extraditing State could be said to be in violation of the Covenant only where it returned a fugitive to certain or foreseeable treatment or punishment, or to judicial procedures which in themselves would be a violation of the Covenant."

In the present case, the State party submits that since Mr. Ng's trial has not yet begun, it was not reasonably foreseeable that he would be held in conditions of incarceration that would violate rights under the Covenant or that he would in fact be put to death. The State party points out that if convicted and sentenced to death, Mr. Ng is entitled to many avenues of appeal in the United States and that he can petition for clemency. Furthermore, he is entitled to challenge in the courts of the United States the conditions under which he is held while his appeals with respect to the death penalty are outstanding.

10.2 With regard to the imposition of the death penalty in the United States, the State party recalls that article 6 of the Covenant did not abolish capital punishment under international law:

> "In countries which have not abolished the death penalty, the sentence of death may still be imposed for the most serious crimes in accordance with law in force at the time of the commission of the crime, not contrary to the provisions of the Covenant and not contrary to the Convention on the Prevention and Punishment of the Crime of Genocide. The death penalty can only be carried out pursuant to a final judgement rendered by a competent court. It may be that Canada would be in violation of the Covenant if it extradited a person to face the possible imposition of the death penalty where it was reasonably foreseeable that the requesting State would impose the death penalty under circumstances which would violate article 6. That is, it may be that an extraditing State would be violating the Covenant to return a fugitive to a State which imposed the death penalty for other than the most serious crimes, or for actions which are not contrary to a law in force at the time of commission, or which carried out the death penalty in the absence of or contrary to the final judgement of a competent court. Such are not the facts here ... Ng did not place any evidence before the Canadian courts, before the Minister of Justice or before the Committee that would suggest that the United States was acting contrary to the stringent criteria established by article 6 when it sought his extradition from Canada ... The Government of Canada, in the person of the Minister of Justice, was satisfied at the time the order of surrender was issued that if Ng is convicted and executed in the State of California, this will be within the conditions expressly prescribed by article 6 of the Covenant".

10.3 Finally, the State party observes that it is "in a difficult position attempting to defend the criminal justice system of the United States before the Committee. It contends that the Optional Protocol process was never intended to place a State in the position of having to defend the laws or practices of another State before the Committee."

10.4 With respect to the issue of whether the death penalty violates article 7 of the Covenant, the State party submits that:

> "... article 7 cannot be read or interpreted without reference to article 6. The Covenant must be read as a whole and its articles as being in harmony ... It may be that certain forms of execution are contrary to article 7. Torturing a person to death would seem to fall into this category, as torture is a violation of article 7. Other forms of execution

> may be in violation of the Covenant because they are cruel, inhuman or degrading. However, as the death penalty is permitted within the narrow parameters set by article 6, it must be that some methods of execution exist which would not violate article 7".

10.5 As to the method of execution, the State party submits that there is no indication that execution by cyanide gas asphyxiation, the chosen method in California, is contrary to the Covenant or to international law. It further submits that no specific circumstances exist in Mr. Ng's case which would lead to a different conclusion concerning the application of this method of execution to him; nor would execution by gas asphyxiation be in violation of the Safeguards guaranteeing protection of the rights of those facing the death penalty, adopted by the Economic and Social Council in its resolution 1984/50 of 25 May 1984.

10.6 Concerning the "death row phenomenon", the State party submits that each case must be examined on its specific facts, including the conditions in the prison in which the prisoner would be held while on death row, the age and mental and physical condition of the prisoner subject to those conditions, the reasonably foreseeable length of time the prisoner would be subject to those conditions, the reasons underlying the length of time and the avenues, if any, for remedying unacceptable conditions. It is submitted that the Minister of Justice and the Canadian courts examined and weighed all the evidence submitted by Mr. Ng as to the conditions of incarceration of persons sentenced to death in California:

> "The Minister of Justice ... was not convinced that the conditions of incarceration in the State of California, considered together with the facts personal to Ng, the element of delay and the continuing access to the courts in the State of California and to the Supreme Court of the United States, would violate Ng's rights under the Canadian Charter of Rights and Freedoms or under the Covenant. The Supreme Court of Canada upheld the Minister's decision in such a way as to make clear that the decision would not subject Ng to a violation of his rights under the Canadian Charter of Rights and Freedoms."

10.7 With respect to the question of the foreseeable length of time Mr. Ng would spend on death row if sentenced to death, the State party stated that:

> "... [t]here was no evidence before the Minister or the Canadian courts regarding any intentions of Ng to make full use of all avenues for judicial review in the United States of any potential sentence of death. There was no evidence that either the judicial system in the State of California or the Supreme Court of the United States had serious problems of backlogs or other forms of institutional delay which would likely be a continuing problem when and if Ng is held to await execution".

In this connection, the State party refers to the Committee's jurisprudence that prolonged judicial proceedings do not per se constitute cruel, inhuman or degrading treatment even if they can be a source of mental strain for the convicted prisoners. k/ The State party contends that it was not reasonably foreseeable on the basis of the facts presented by Mr. Ng during the extradition process in Canada that any possible period of prolonged detention upon his return to the United States would result in a violation of the Covenant, but that it was more likely that any prolonged detention on death row would be attributable to Mr. Ng pursuing the many avenues for judicial review in the United States.

Author's and counsel's comments on the State party's submission

11.1 With regard to the extradition process in Canada, counsel points out that a fugitive is ordered committed to await surrender when the judge is satisfied that a legal basis for extradition exists. Counsel emphasizes, however, that the extradition hearing is not a trial and the fugitive has no general right to cross-examine witnesses. The extradition judge does not weigh evidence against the fugitive with regard to the charges against him, but essentially determines whether a prima facie case exists. Because of this limited competence, no evidence can be called pertaining to the effects of the surrender on the fugitive.

11.2 As regards article 6 of the Extradition Treaty, counsel recalls that when the Treaty was signed in December 1971, the Canadian Criminal Code still provided for capital punishment in cases of murder, so that article 6 could have been invoked by either contracting State. Counsel submits that article 6 does not require assurances to be sought only in particularly "special" death penalty cases. He argues that the provision of the possibility to ask for assurances under article 6 of the Treaty implicitly acknowledges that offences punishable by death are to be dealt with differently, that different values and traditions with regard to the death penalty may be taken into account when deciding upon an extradition request and that an actual demand for assurances will not be perceived by the other party as unwarranted interference with the internal affairs of the requesting State. In particular, article 6 of the Treaty is said to "... allow the requested State ... to maintain a consistent position: if the death penalty is rejected within its own borders ... it could negate any responsibility for exposing a fugitive through surrender, to the risk of imposition of that penalty or associated practices and procedures in the other State". It is further submitted that "it is very significant that the existence of the discretion embodied in article 6, in relation to the death penalty, enables the contracting parties to honour both their own domestic constitutions and their international obligations without violating their obligations under the bilateral Extradition Treaty".

11.3 With regard to the link between extradition and the protection of society, counsel notes that the number of requests for extradition by the United States in 1991 was 17, whereas the number in 1992 was 88. He recalls that at the end of 1991, the Extradition Treaty between the United States and Canada was amended to the effect that, inter alia, taxation offences became extraditable; ambiguities with regard to the rules of double jeopardy and reciprocity were removed. Counsel contends that the increase in extradition requests may be attributable to these 1991 amendments. In this context, he submits that at the time of the author's surrender, article 6 of the Treaty had been in force for 15 years, during which the Canadian Minister of Justice had been called upon to make no more than three decisions on whether or not to ask for assurances that the death penalty would not be imposed or executed. It is therefore submitted that the State party's fear that routine requests for assurances would lead to a flood of capital defendants is unsubstantiated. Counsel finally argues that it is inconceivable that the United States would have refused article 6 assurances had they been requested in the author's case.

11.4 As regards the extradition proceedings against Mr. Ng, counsel notes that his Federal Court action against the Minister's decision to extradite the author without seeking assurances never was decided upon by the Federal Court, but was referred to the Supreme Court to be decided together with Mr. Kindler's appeal. In this context, counsel notes that the Supreme Court, when deciding that the author's extradition would not violate the Canadian constitution, failed to discuss criminal procedure in California or evidence adduced in relation to the death row phenomenon in California.

11.5 As to the State party's argument that extradition is beyond the scope of the Covenant, counsel argues that the travaux préparatoires do not show that the fundamental human rights set forth in the Covenant should never apply to extradition situations:

> "Reluctance to include an express provision on extradition because the Covenant should 'lay down general principles' or because it should lay down 'fundamental human rights and not rights which are corollaries thereof' or because extradition was 'too complicated to be included in a single article' simply does not bespeak an intention to narrow or stultify those 'general principles' or 'fundamental human rights' or evidence a consensus that these general principles should never apply to extradition situations."

11.6 Counsel further argues that already during the extradition proceedings in Canada, the author suffered from anxiety because of the uncertainty of his fate, the possibility of being surrendered to California to face capital charges and the likelihood that he would be "facing an extremely hostile and high security reception by California law enforcement agencies", and that he must therefore be considered a victim within the meaning of article 1 of the Optional Protocol. In this context, the author submits that he was aware "that the California Supreme Court had, since 1990, become perhaps the most rigid court in the country in rejecting appeals from capital defendants".

11.7 The author refers to the Committee's decision of 28 October 1992 and submits that in the circumstances of his case, the very purpose of his extradition without seeking assurances was to foreseeably expose him to the imposition of the death penalty and consequently to the death row phenomenon. In this connection, counsel submits that the author's extradition was sought upon charges which carry the death penalty, and that the prosecution in California never left any doubt that it would indeed seek the death penalty. He quotes the Assistant District Attorney in San Francisco as saying that: "there is sufficient evidence to convict and send Ng to the gas chamber if he is extradited ...".

11.8 In this context, counsel quotes from the judgment of the European Court of Human Rights in the Soering case:

> "In the independent exercise of his discretion, the Commonwealth's attorney has himself decided to seek and persist in seeking the death penalty because the evidence, in his determination, supports such action. If the national authority with responsibility for prosecuting the offence takes such a firm stance, it is hardly open to the court to hold that there are no substantial grounds for believing that the applicant faces a real risk of being sentenced to death and hence experiencing the 'death row phenomenon'."

Counsel submits that, at the time of extradition, it was foreseeable that the author would be sentenced to death in California and therefore be exposed to violations of the Covenant.

11.9 Counsel refers to several resolutions adopted by the General Assembly in which the abolition of the death penalty was considered desirable. 1/ He further refers to Protocol 6 of the European Convention for the Protection of

Human Rights and Fundamental Freedoms and to the Second Optional Protocol to the International Covenant on Civil and Political Rights: "[O]ver the last fifty years there has been a progressive and increasingly rapid evolution away from the death penalty. That evolution has led almost all Western democracies to abandon it". He argues that this development should be taken into account when interpreting the Covenant.

11.10 As to the method of execution in California, cyanide gas asphyxiation, counsel argues that it constitutes inhuman and degrading punishment within the meaning of article 7 of the Covenant. He notes that asphyxiation may take up to 12 minutes, during which condemned persons remain conscious, experience obvious pain and agony, drool and convulse and often soil themselves (reference is made to the execution of Robert F. Harris at San Quentin Prison in April 1992). Counsel further argues that, given the cruel character of this method of execution, a decision of Canada not to extradite without assurances would not constitute a breach of its Treaty obligations with the United States or undue interference with the latter's internal law and practices. Furthermore, counsel notes that cyanide gas execution is the sole method of execution in only three States in the United States (Arizona, Maryland and California), and that there is no evidence to suggest that it is an approved means of carrying out judicially mandated executions elsewhere in the international community.

11.11 As to the death row phenomenon, the author emphasizes that he intends to make full use of all avenues of appeal and review in the United States, and that his intention was clear to the Canadian authorities during the extradition proceedings. As to the delay in criminal proceedings in California, counsel refers to estimates that it would require the Supreme Court of California 16 years to clear the present backlog in hearing capital appeals. The author reiterates that the judgements of the Supreme Court in Canada did not in any detail discuss evidence pertaining to capital procedures in California, conditions on death row at San Quentin Prison or execution by cyanide gas, although he presented evidence relating to these issues to the Court. He refers to his factum to the Supreme Court, in which it was stated:

> "At present, there are approximately 280 inmates on death row at San Quentin. The cells in which inmates are housed afford little room for movement. Exercise is virtually impossible. When a condemned inmate approaches within three days of an execution date, he is placed under 24-hour guard in a range of three stripped cells. This can occur numerous times during the review and appeal process ... Opportunity for exercise is very limited in a small and crowded yard. Tension is consistently high and can escalate as execution dates approach. Secondary tension and anguish is experienced by some as appeal and execution dates approach for others. There is little opportunity to relieve tension. Programmes are extremely limited. There are no educational programmes. The prison does little more than warehouse the condemned for years pending execution ... Death row inmates have few visitors and few financial resources, increasing their sense of isolation and hopelessness. Suicides occur and are attributable to the conditions, lack of programmes, extremely inadequate psychiatric and physiological care and the tension, apprehension, depression and despair which permeate death row."

11.12 Finally, the author describes the circumstances of his present custodial regime at Folsom Prison, California, conditions which he submits would be similar if convicted. He submits that whereas the other detainees, all convicted criminals, have a proven track record of prison violence and gang affiliation, he, as a pre-trial detainee, is subjected to far more severe custodial restraints than any of them. Thus, when moving around in the prison, he is always put in full shackles (hand, waist and legs), is forced to keep leg irons on when showering, is not allowed any social interaction with the other detainees; is given less than five hours per week of yard exercise; and is continuously facing hostility from the prison staff, in spite of good behaviour. Mr. Ng adds that unusual and very onerous conditions have been imposed on visits from his lawyers and others working on his case; direct face-to-face conversations with investigators have been made impossible, and conversations with them, conducted over the telephone or through a glass window, may be overheard by prison staff. These restrictions are said to seriously undermine the preparation of his trial defence. Moreover, his appearances in Calaveras County Court are accompanied by exceptional security measures. For example, during every court recess, the author is taken from the courtroom to an adjacent jury room and placed, still shackled, into a three foot by four foot cage, specially built for the case. The author contends that no pre-trial detainee has ever been subjected to such drastic security measures in California.

11.13 The author concludes that the conditions of confinement have taken a heavy toll on him, physically and mentally. He has lost much weight and suffers from sleeplessness, anxiety and other nervous disorders. This situation, he emphasizes, has foreclosed "progress toward preparation of a reasonably adequate defence".

Further submission from the author and the State party's reaction thereto

12.1 In an affidavit dated 5 June 1993, signed by Mr. Ng and submitted by his counsel, the author provides detailed information about the conditions of his confinement in Canada between 1985 and his extradition in September 1991. He notes that following his arrest on 6 July 1985, he was kept at the Calgary Remand Center in solitary confinement under a so-called "suicide watch", which meant 24-hour camera supervision and the placement of a guard outside the bars of the cell. He was only allowed one hour of exercise each day in the Center's "mini-yard", on "walk-alone status" and accompanied by two guards. As the extradition process unfolded in Canada, the author was transferred to a prison in Edmonton; he complains about "drastically more severe custodial restrictions" from February 1987 to September 1991, which he links to the constant and escalating media coverage of the case. Prison guards allegedly began to tout him, he was kept in total isolation, and contact with visitors was restricted.

12.2 Throughout the period from 1987 to 1991, the author was kept informed about progress in the extradition process; his lawyers informed him about the "formidable problems" he would face if returned to California for prosecution, as well as about the "increasingly hostile political and judicial climate in California towards capital defendants generally". As a result, he experienced extreme stress, sleeplessness and anxiety, all of which were heightened as the dates of judicial decisions in the extradition process approached.

12.3 Finally, the author complains about the deceptions committed by Canadian prison authorities following the release of the decision of the Canadian Supreme Court on 26 September 1991. Thus, instead of being allowed to contact counsel after the release of the decision and to obtain advice about the availability of any remedies, as agreed between counsel and a prison warden, he claims that he was lured from his cell, in the belief that he would be allowed to contact counsel, and thereafter told that he was being transferred to the custody of United States marshals.

12.4 The State party objects to these new allegations as they "are separate from the complainant's original submission and can only serve to delay consideration of the original communication by the Human Rights Committee". It accordingly requests the Committee not to take these claims into consideration.

Review of admissibility and consideration of merits

13.1 In his initial submission, author's counsel alleged that Mr. Ng was a victim of violations of articles 6, 7, 9, 10, 14 and 26 of the Covenant.

13.2 When the Committee considered the admissibility of the communication during its forty-sixth session and adopted a decision relating thereto (decision of 28 October 1992), it noted that the communication raised complex issues with regard to the compatibility with the Covenant, ratione materiae, of extradition to face capital punishment, in particular with regard to the scope of articles 6 and 7 of the Covenant to such situations and their application in the author's case. It noted, however, that questions about the issue of whether the author could be deemed a "victim" within the meaning of article 1 of the Optional Protocol remained, but held that only consideration of the merits of all the circumstances under which the extradition procedure and all its effects occurred, would enable the Committee to determine whether Mr. Ng was indeed a victim within the meaning of article 1. The State party has made extensive new submissions on both admissibility and merits and reaffirmed that the communication is inadmissible because "the evidence shows that Ng is not the victim of any violation in Canada of rights set out in the Covenant". Counsel, in turn, has filed detailed objections to the State party's affirmations.

13.3 In reviewing the question of admissibility, the Committee takes note of the contentions of the State party and of counsel's arguments. It notes that counsel, in submissions made after the decision of 28 October 1992, has introduced entirely new issues which were not raised in the original communication, and which relate to Mr. Ng's conditions of detention in Canadian penitentiaries, the stress to which he was exposed as the extradition process proceeded, and alleged deceptive manoeuvres by Canadian prison authorities.

13.4 These fresh allegations, if corroborated, would raise issues under articles 7 and 10 of the Covenant, and would bring the author within the ambit of article 1 of the Optional Protocol. While the wording of the decision of 28 October 1992 would not have precluded counsel from introducing them at this stage of the procedure, the Committee, in the circumstances of the case, finds that it need not address the new claims, as domestic remedies before the Canadian courts were not exhausted in respect of them. It transpires from the material before the Committee that complaints about the conditions of the author's detention in Canada or about alleged irregularities committed by Canadian prison authorities were not raised either during the committal or the surrender phase of the extradition proceedings. Had it been argued that an effective remedy for the determination of these claims is no longer available, the Committee finds that it was incumbent upon counsel to raise them before the competent courts, provincial or federal, at the material time. This part of the author's allegations is therefore declared inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

13.5 It remains for the Committee to examine the author's claim that he is a "victim" within the meaning of the Optional Protocol because he was extradited to California on capital charges pending trial, without the assurances provided for in article 6 of the Extradition Treaty between Canada and the United States. In this connection, it is to be recalled that: (a) California had sought the author's extradition on charges which, if proven, carry the death penalty; (b) the United States requested Mr. Ng's extradition on those capital charges; (c) the extradition warrant documents the existence of a prima facie case against the author; (d) United States prosecutors involved in the case have stated that they would ask for the death penalty to be imposed; and (e) the State of California, when intervening before the Supreme Court of Canada, did not disavow the prosecutors' position. The Committee considers that these facts raise questions with regard to the scope of articles 6 and 7, in relation to which, on issues of admissibility alone, the Committee's jurisprudence is not dispositive. As indicated in the case of Kindler v. Canada, m/ only an examination on the merits of the claims will enable the Committee to pronounce itself on the scope of these articles and to clarify the applicability of the Covenant and Optional Protocol to cases concerning extradition to face the death penalty.

14.1 Before addressing the merits of the communication, the Committee observes that what is at issue is not whether Mr. Ng's rights have been or are likely to be violated by the United States, which is not a State party to the Optional Protocol, but whether by extraditing Mr. Ng to the United States, Canada exposed him to a real risk of a violation of his rights under the Covenant. States parties to the Covenant will also frequently be parties to bilateral treaty obligations, including those under extradition treaties. A State party to the Covenant must ensure that it carries out all its other legal commitments in a manner consistent with the Covenant. The starting-point for consideration of this issue must be the State party's obligation, under article 2, paragraph 1, of the Covenant, namely, to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant. The right to life is the most essential of these rights.

14.2 If a State party extradites a person within its jurisdiction in such circumstances, and if, as a result, there is a real risk that his or her rights under the Covenant will be violated in another jurisdiction, the State party itself may be in violation of the Covenant.

15.1 With regard to a possible violation by Canada of article 6 of the Covenant by its decision to extradite Mr. Ng, two related questions arise:

(a) Did the requirement under article 6, paragraph 1, to protect the right to life prohibit Canada from exposing a person within its jurisdiction to the real risk (i.e. a necessary and foreseeable consequence) of being sentenced to death and losing his life in circumstances incompatible with article 6 of the Covenant as a consequence of extradition to the United States?

(b) Did the fact that Canada had abolished capital punishment except for certain military offences require Canada to refuse extradition or request assurances from the United States, as it was entitled to do under article 6 of the Extradition Treaty, that the death penalty would not be imposed against Mr. Ng?

15.2 Counsel claims that capital punishment must be viewed as a violation of article 6 of the Covenant "in all but the most horrendous cases of heinous crime; it can no longer be accepted as the standard penalty for murder". Counsel, however, does not substantiate this statement or link it to the specific circumstances of the present case. In reviewing the facts submitted by author's counsel and by the State party, the Committee notes that Mr. Ng was convicted of committing murder under aggravating circumstances; this would appear to bring the case within the scope of article 6, paragraph 2, of the

Covenant. In this connection the Committee recalls that it is not a "fourth instance" and that it is not within its competence under the Optional Protocol to review sentences of the courts of States. This limitation of competence applies a fortiori where the proceedings take place in a State that is not party to the Optional Protocol.

15.3 The Committee notes that article 6, paragraph 1, must be read together with article 6, paragraph 2, which does not prohibit the imposition of the death penalty for the most serious crimes. Canada did not itself charge Mr. Ng with capital offences, but extradited him to the United States, where he faces capital charges and the possible (and foreseeable) imposition of the death penalty. If Mr. Ng had been exposed, through extradition from Canada, to a real risk of a violation of article 6, paragraph 2, in the United States, this would have entailed a violation by Canada of its obligations under article 6, paragraph 1. Among the requirements of article 6, paragraph 2, is that capital punishment be imposed only for the most serious crimes, under circumstances not contrary to the Covenant and other instruments, and that it be carried out pursuant to a final judgement rendered by a competent court. The Committee notes that Mr. Ng was extradited to stand trial on 19 criminal charges, including 12 counts of murder. If sentenced to death, that sentence, based on the information which the Committee has before it, would be based on a conviction of guilt in respect of very serious crimes. He was over 18 years old when the crimes of which he stands accused were committed. Finally, while the author has claimed before the Supreme Court of Canada and before the Committee that his right to a fair trial would not be guaranteed in the judicial process in California, because of racial bias in the jury selection process and in the imposition of the death penalty, these claims have been advanced in respect of purely hypothetical events. Nothing in the file supports the contention that the author's trial in the Calaveras County Court would not meet the requirements of article 14 of the Covenant.

15.4 Moreover, the Committee observes that Mr. Ng was extradited to the United States after extensive proceedings in the Canadian courts, which reviewed all the charges and the evidence available against the author. In the circumstances, the Committee concludes that Canada's obligations under article 6, paragraph 1, did not require it to refuse Mr. Ng's extradition.

15.5 The Committee notes that Canada has itself, except for certain categories of military offences, abolished capital punishment; it is not, however, a party to the Second Optional Protocol to the Covenant. As to issue (b) in paragraph 15.1 above, namely, whether the fact that Canada has generally abolished capital punishment, taken together with its obligations under the Covenant, required it to refuse extradition or to seek the assurances it was entitled to seek under the Extradition Treaty, the Committee observes that abolition of capital punishment does not release Canada of its obligations under extradition treaties. However, it should be expected that, when exercising a permitted discretion under an extradition treaty (namely, whether or not to seek assurances that the death penalty would not be imposed), a State party, which itself abandoned capital punishment, will give serious consideration to its own chosen policy. The Committee notes, however, that Canada has indicated that the possibility of seeking assurances would normally be exercised where special circumstances existed; in the present case, this possibility was considered and rejected.

15.6 While States must be mindful of their obligation to protect the right to life when exercising their discretion in the application of extradition treaties, the Committee does not find that the terms of article 6 of the

Covenant necessarily require Canada to refuse to extradite or to seek assurances. The Committee notes that the extradition of Mr. Ng would have violated Canada's obligations under article 6 of the Covenant if the decision to extradite without assurances had been taken summarily or arbitrarily. The evidence before the Committee reveals, however, that the Minister of Justice reached his decision after hearing extensive arguments in favour of seeking assurances. The Committee further takes note of the reasons advanced by the Minister of Justice in his letter dated 26 October 1989 addressed to Mr. Ng's counsel, in particular, the absence of exceptional circumstances, the availability of due process and of appeal against conviction and the importance of not providing a safe haven for those accused of murder.

15.7 In the light of the above, the Committee concludes that Mr. Ng is not a victim of a violation by Canada of article 6 of the Covenant.

16.1 In determining whether, in a particular case, the imposition of capital punishment constitutes a violation of article 7, the Committee will have regard to the relevant personal factors regarding the author, the specific conditions of detention on death row and whether the proposed method of execution is particularly abhorrent. In the instant case, it is contented that execution by gas asphyxiation is contrary to internationally accepted standards of humane treatment, and that it amounts to treatment in violation of article 7 of the Covenant. The Committee begins by noting that whereas article 6, paragraph 2, allows for the imposition of the death penalty under certain limited circumstances, any method of execution provided for by law must be designed in such a way as to avoid conflict with article 7.

16.2 The Committee is aware that, by definition, every execution of a sentence of death may be considered to constitute cruel and inhuman treatment within the meaning of article 7 of the Covenant; on the other hand, article 6, paragraph 2, permits the imposition of capital punishment for the most serious crimes. None the less, the Committee reaffirms, as it did in its general comment 20(44) on article 7 of the Covenant that, when imposing capital punishment, the execution of the sentence "must be carried out in such a way as to cause the least possible physical and mental suffering". n/

16.3 In the present case, the author has provided detailed information that execution by gas asphyxiation may cause prolonged suffering and agony and does not result in death as swiftly as possible, as asphyxiation by cyanide gas may take over 10 minutes. The State party had the opportunity to refute these allegations on the facts; it has failed to do so. Rather, the State party has confined itself to arguing that in the absence of a norm of international law which expressly prohibits asphyxiation by cyanide gas, "it would be interfering to an unwarranted degree with the internal laws and practices of the United States to refuse to extradite a fugitive to face the possible imposition of the death penalty by cyanide gas asphyxiation".

16.4 In the instant case and on the basis of the information before it, the Committee concludes that execution by gas asphyxiation, should the death penalty be imposed on the author, would not meet the test of "least possible physical and mental suffering", and constitutes cruel and inhuman treatment, in violation of article 7 of the Covenant. Accordingly, Canada, which could reasonably foresee that Mr. Ng, if sentenced to death, would be executed in a way that amounts to a violation of article 7, failed to comply with its obligations under the Covenant, by extraditing Mr. Ng without having sought and received assurances that he would not be executed.

16.5 The Committee need not pronounce itself on the compatibility with article 7 of methods of execution other than that which is at issue in this case.

17. The Human Rights Committee, acting under article 5, paragraph 4, of the International Covenant on Civil and Political Rights, is of the view that the facts as found by the Committee reveal a violation by Canada of article 7 of the Covenant.

18. The Human Rights Committee requests the State party to make such representations as might still be possible to avoid the imposition of the death penalty and appeals to the State party to ensure that a similar situation does not arise in the future.

[Adopted in English, French and Spanish, the English text being the original version.]

Notes

a/ Official Records of the General Assembly, Thirty-seventh Session, Supplement No. 40 (A/37/40), annex XIV, Leo Hertzberg et al. v. Finland, views adopted on 2 April 1982, para. 9.3.

b/ Ibid., Forty-third Session, Supplement No. 40 (A/43/40), annex IX.C, H. v. d. P. v. the Netherlands, declared inadmissible on 8 April 1987, para. 3.2.

c/ Ibid., Thirty-ninth Session, Supplement No. 40 (A/39/40), annex XIV, M. A. v. Italy, declared inadmissible on 10 April 1984, para. 13.4.

d/ See General Assembly resolution 45/116 of 14 December 1990, annex.

e/ Official Records of the General Assembly, Thirty-sixth Session, Supplement No. 40 (A/36/40), annex XIII, S. Aumeeruddy-Cziffra et al. v. Mauritius, views adopted on 9 April 1981, para. 9.2.

f/ Ibid., Thirty-ninth Session, Supplement No. 40 (A/39/40), annex XI, Antonio Viana Acosta v. Uruguay, views adopted on 29 March 1984, para. 6.

g/ Official Records of the General Assembly, Thirty-eighth Session, Supplement No. 40 (A/38/40), annex XXII, Almeida de Quinteros v. Uruguay, views adopted on 21 July 1983, para. 14.

h/ Ibid., Thirty-ninth Session, Supplement No. 40 (A/39/40), annex IV, communication No. 117/1981 (M. A. v. Italy), decision adopted on 10 April 1984, para. 13.4: "There is no provision of the Covenant making it unlawful for a State party to seek extradition of a person from another country".

i/ Official Records of the General Assembly, Thirty-sixth Session, Supplement No. 40 (A/36/40), annex XIII, communication No. 35/1978 (Aumeeruddy-Cziffra et al. v. Mauritius), views adopted on 9 April 1981; and ibid., Forty-fifth Session, Supplement No. 40 (A/45/40), annex IX.K, communication No. 291/1988 (Torres v. Finland), views adopted on 2 April 1990.

j/ Ibid., Forty-eighth Session, Supplement No. 40 (A/48/40), annex XII.U, communication No. 470/1991 (Kindler v. Canada), views adopted on 30 July 1993.

k/ Ibid., Forty-fourth Session, Supplement No. 40 (A/44/40), annex X.F, communications Nos. 210/1986 and 225/1987 (Earl Pratt and Ivan Morgan v. Jamaica), views adopted on 6 April 1989; and ibid., Forty-seventh Session, Supplement No. 40 (A/47/40), annex IX.F, communications Nos. 270/1988 and 271/1988 (Randolph Barrett and Clyde Sutcliffe v. Jamaica), views adopted on 30 March 1992.

l/ General Assembly resolutions 2857 (XXVI) of 20 December 1971, 32/61 of 8 December 1977 and 37/192 of 18 December 1982.

m/ See communication No. 470/1991, views adopted on 30 July 1993, para. 12.3.

n/ Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40 (A/47/40), annex VI.A, general comment 20(44), para. 6.

Appendix

Individual opinions submitted under rule 94, paragraph 3, of the rules of procedure of the Human Rights Committee, concerning the Committee's views on communication No. 469/1991 (Charles Chitat Ng v. Canada)

A. Individual opinion submitted by Mr. Fausto Pocar (partly dissenting, partly concurring and elaborating)

I cannot agree with the finding of the Committee that in the present case, there has been no violation of article 6 of the Covenant. The question of whether the fact that Canada had abolished capital punishment except for certain military offences required its authorities to refuse extradition or request assurances from the United States to the effect that the death penalty would not be imposed on Mr. Charles Chitat Ng, must, in my view, receive an affirmative answer.

Regarding the death penalty, it must be recalled that, although article 6 of the Covenant does not prescribe categorically the abolition of capital punishment, it imposes a set of obligations on States parties that have not yet abolished it. As the Committee pointed out in its general comment 6 (16), "the article also refers generally to abolition in terms which strongly suggest that abolition is desirable". Furthermore, the wording of paragraphs 2 and 6 clearly indicates that article 6 tolerates - within certain limits and in view of future abolition - the existence of capital punishment in States parties that have not yet abolished it, but may by no means be interpreted as implying for any State party an authorization to delay its abolition or, a fortiori, to enlarge its scope or to introduce or reintroduce it. Accordingly, a State party that has abolished the death penalty is, in my view, under the legal obligation, under article 6 of the Covenant, not to reintroduce it. This obligation must refer both to a direct reintroduction within the State party's jurisdiction, as well as to an indirect one, as is the case when the State acts - through extradition, expulsion or compulsory return - in such a way that an individual within its territory and subject to its jurisdiction may be exposed to capital punishment in another State. I therefore conclude that in the present case there has been a violation of article 6 of the Covenant.

Regarding the claim under article 7, I agree with the Committee that there has been a violation of the Covenant, but on different grounds. I subscribe to the observation of the Committee that "by definition, every execution of a sentence of death may be considered to constitute cruel and inhuman treatment within the meaning of article 7 of the Covenant". Consequently, a violation of the provisions of article 6 that may make such treatment, in certain circumstances, permissible, entails necessarily, and irrespective of the way in which the execution may be carried out, a violation of article 7 of the Covenant. It is for these reasons that I conclude in the present case that there has been a violation of article 7 of the Covenant.

[English original]

B. Individual opinion submitted by Messrs. A. Mavrommatis and W. Sadi (dissenting)

We do not believe that, on the basis of the material before us, execution by gas asphyxiation could constitute cruel and inhuman treatment within the meaning of article 7 of the Covenant. A method of execution such as death by stoning, which is intended to and actually inflicts prolonged pain and suffering, is contrary to article 7.

Every known method of judicial execution in use today, including execution by lethal injection, has come under criticism for causing prolonged pain or the necessity to have the process repeated. We do not believe that the Committee should look into such details in respect of execution such as whether acute pain of limited duration or less pain of longer duration is preferable and could be a criterion for a finding of violation of the Covenant.

[English original]

C. Individual opinion submitted by Mr. Rajsoomer Lallah (dissenting)

For the reasons I have already given in my separate opinion in the case of J. J. Kindler v. Canada (communication No. 470/1991) with regard to the obligations of Canada under the Covenant, I would conclude that there has been a violation of article 6 of the Covenant. If only for that reason alone, article 7 has also, in my opinion, been violated.

Even at this stage, Canada should use its best efforts to provide a remedy by making appropriate representations, so as to ensure that, if convicted and sentenced to death, the author would not be executed.

[English original]

D. Individual opinion submitted by Mr. Bertil Wennergren (partly dissenting, partly concurring)

I do not share the Committee's views with respect to a non-violation of article 6 of the Covenant, as expressed in paragraphs 15.6 and 15.7 of the views. On grounds that I have developed in detail in my individual opinion concerning the Committee's views on communication No.470/1991 (Joseph Kindler v. Canada) Canada did, in my view, violate article 6, paragraph 1, of the Covenant by consenting to extradite Mr. Ng to the United States without having secured assurances that he would not, if convicted and sentenced to death, be subjected to the execution of the death sentence.

I do share the Committee's views, formulated in paragraphs 16.1 to 16.5, that Canada failed to comply with its obligations under the Covenant by extraditing Mr. Ng to the United States, where, if sentenced to death, he would be executed by means of a method that amounts to a violation of article 7. In my view, article 2 of the Covenant obliged Canada not merely to seek assurances that Mr. Ng would not be subjected to the execution of a death sentence but also, if it decided none the less to extradite Mr. Ng without such assurances, as was the case, to at least secure assurances that he would not be subjected to the execution of the death sentence by cyanide gas asphyxiation.

Article 6, paragraph 2, of the Covenant permits courts in countries which have not abolished the death penalty to impose the death sentence on an individual if that individual has been found guilty of a most serious crime, and to carry out the death sentence by execution. This exception from the rule of article 6, paragraph 1, applies only vis-à-vis the State party in question, not vis-à-vis other States parties to the Covenant. It therefore did not apply to Canada as it concerned an execution to be carried out in the United States.

By definition, every type of deprivation of an individual's life is inhuman. In practice, however, some methods have by common agreement been considered as acceptable methods of execution. Asphyxiation by gas is definitely not to be found among them. There remain, however, divergent opinions on this subject. On 21 April 1992, the Supreme Court of the United States denied an individual a stay of execution by gas asphyxiation in California by a seven-to-two vote. One of the dissenting justices, Justice John Paul Stevens, wrote:

> "The barbaric use of cyanide gas in the Holocaust, the development of cyanide agents as chemical weapons, our contemporary understanding of execution by lethal gas and the development of less cruel methods of execution all demonstrate that execution by cyanide gas is unnecessarily cruel. In light of all we know about the extreme and unnecessary pain inflicted by execution by cyanide gas."

Justice Stevens found that the individual's claim had merit.

In my view, the above summarizes in a very convincing way why gas asphyxiation must be considered as a cruel and unusual punishment that amounts to a violation of article 7. What is more, the State of California, in August 1992, enacted a statute law that enables an individual under sentence of death to choose lethal injection as the method of execution, in lieu of the gas chamber. The statute law went into effect on 1 January 1993. Two executions by lethal gas had taken place during 1992, approximately one year after the extradition of Mr. Ng. By amending its legislation in the way described above, the State of California joined 22 other States in the United States. The purpose of the legislative amendment was not, however, to eliminate an allegedly cruel and unusual punishment, but to forestall last-minute appeals by condemned prisoners who might argue that execution by lethal gas constitutes such punishment. Not that I consider execution by lethal injection acceptable either from a point of view of humanity, but - at least - it does not stand out as an unnecessarily cruel and inhumane method of execution, as does gas asphyxiation. Canada failed to fulfil its obligation to protect Mr. Ng against cruel and inhuman punishment by extraditing him to the United States (the State of California), where he might be subjected to such punishment. And Canada did so without seeking and obtaining assurances of his non-execution by means of the only method of execution that existed in the State of California at the material time of extradition.

[English original]

E. Individual opinion submitted by Mr. Kurt Herndl (dissenting)

1. While I do agree with the Committee's finding that there is no violation of article 6 of the Covenant in the present case, I do not share the majority's findings as to a possible violation of article 7. In fact, I completely

disagree with the conclusion that Canada which - as the Committee's majority argue in paragraph 16.4 of the views - "could reasonably foresee that Mr. Ng, if sentenced to death, would be executed in a way that amounts to a violation of article 7", has thus "failed to comply with its obligations under the Covenant by extraditing Mr. Ng without having sought and received guarantees that he would not be executed".

2. The following are the reasons for my dissent.

Mr. Ng cannot be regarded as victim in the sense of article 1 of the Optional Protocol

3. The issue of whether Mr. Ng can or cannot be regarded as a victim was left open in the decision on admissibility (decision of 28 October 1992). There the Committee observed that pursuant to article 1 of the Optional Protocol, it may only receive and consider communications from individuals subject to the jurisdiction of a State party to the Covenant and to the Optional Protocol "who claim to be victims of a violation by that State party of any of their rights set forth in the Covenant". In the present case, the Committee concluded that only the consideration on the merits of the circumstances under which the extradition procedure and all its effects occurred, would enable it to determine whether the author was a victim within the meaning of article 1 of the Optional Protocol. Accordingly the Committee decided to join the question of whether the author is a victim to the consideration of the merits. So far so good.

4. In its views, however, the Committee does no longer address the issue of whether Mr. Ng is a victim. In this connection, the following reasoning has to be made.

5. As to the concept of victim, the Committee has in recent decisions recalled its established jurisprudence, based on the admissibility decision in the case of E. W. et al. v. the Netherlands (case No. 429/1990), where the Committee declared the relevant communication inadmissible under the Optional Protocol. In the case mentioned, the Committee held that "for a person to claim to be a victim of a violation of a right protected by the Covenant, he or she must show either that an act or an omission of a State party has already adversely affected his or her enjoyment of such right, or that such an effect is imminent".

6. In the case of John Kindler v. Canada (communication No. 470/1991) the Committee has, in its admissibility decision (decision of 31 July 1992), somewhat expanded on the notion of victim by stating that while a State party clearly is not required to guarantee the rights of persons within another jurisdiction, if such a State party takes a decision relating to a person within its jurisdiction, and the necessary and foreseeable consequence is that this person's rights under the Covenant will be violated in another jurisdiction, the State party itself may be in violation of the Covenant. To illustrate this, the Committee referred to the "handing over of a person to another State ... where treatment contrary to the Covenant is certain or is the very purpose of the handing over" (paragraph 6.4). In the subsequent decision on the merits of the Kindler case (decision of 30 July 1993), the Committee introduced the concept of "real risk". The Committee stated that "if a State party extradites a person within its jurisdiction in circumstances such that as a result there is a real risk that his or her rights under the Covenant will be violated in another jurisdiction, the State party may be in violation of the Covenant" (paragraph 13.2).

7. The case of Mr. Ng apparently meets none of these tests; neither can it be argued that torture or cruel, inhuman or degrading treatment or punishment (in the sense of article 7 of the Covenant) in the receiving State is the necessary and foreseeable consequence of Mr. Ng's extradition, nor can it be maintained that there would be a real risk of such treatment.

8. Mr. Ng is charged in California with 19 criminal counts, including kidnapping and 12 murders, committed in 1984 and 1985. However, he has so far not been tried, convicted or sentenced. If he were convicted, he would still have various opportunities to appeal his conviction and sentence through state and federal appeals instances, up to the Supreme Court of the United States. Furthermore, given the nature of the crimes allegedly committed by Mr. Ng it is completely open at this stage whether or not the death penalty will be imposed, as a plea of insanity could be entered and might be successful.

9. In their joint individual opinion on the admissibility of a similar case (not yet made public) several members of the Committee, including myself, have again emphasized that the violation that would affect the author personally in another jurisdiction must be a necessary and foreseeable consequence of the action of the defendant State. As the author in that case had not been tried and, a fortiori, had not been found guilty or recommended to the death penalty, the dissenting members of the Committee were of the view that the test had not been met.

10. In view of what is explained in the preceding paragraphs, the same consideration would hold true for the case of Mr. Ng, who thus cannot be regarded as victim in the sense of article 1 of the Optional Protocol.

There are no secured elements to determine that execution by gas asphyxiation would in itself constitute a violation of article 7 of the Covenant

11. The Committee's majority is of the view that judicial execution by gas asphyxiation, should the death penalty be imposed on Mr. Ng, would not meet the test of the "least possible physical and mental suffering", and thus would constitute cruel and inhuman treatment in violation of article 7 of the Covenant (paragraph 16.4). The Committee's majority thus attempts to make a distinction between various methods of execution.

12. The reasons for the assumption that the specific method of execution currently applied in California would not meet the above-mentioned test of the "least possible physical and mental suffering" - this being the only reason given to substantiate the finding of a violation of article 7 - is that "execution by gas asphyxiation may cause prolonged suffering and agony and does not result in death as swiftly as possible, as asphyxiation by cyanide gas may take over 10 minutes" (paragraph 16.3).

13. No scientific or other evidence is quoted in support of this dictum. Rather, the onus of proof is placed on the defendant State, which, in the majority's view, had the opportunity to refute the allegations of the author on the facts, but failed to do so. This view is simply incorrect.

14. As the fact sheets of the case show, the remarks by the Government of Canada on the sub-issue "death penalty as a violation of article 7" total two and a half pages. In those remarks, the Government of Canada states, *inter alia*, the following:

> "While it may be that some methods of execution would clearly violate the Covenant, it is far from clear from a review of the wording of the Covenant and the comments and jurisprudence of the Committee, what point on the spectrum separates those methods of judicial execution which violate article 7 and those which do not".

15. This argument is in line with the view of Professor Cherif Bassiouni, who, in his analysis of what treatment could constitute "cruel and unusual punishment", comes to the following conclusion:

> "The wide divergence in penological theories and standards of treatment of offenders between countries is such that no uniform standard exists ... the prohibition against cruel and unusual punishment can be said to constitute a general principle of international law because it is so regarded by the legal system of civilized nations, but that alone does not give it a sufficiently defined content bearing on identifiable applications capable of more than general recognition". a/

16. In its submission, the Government of Canada furthermore stressed that "none of the methods currently in use in the United States is of such a nature as to constitute a violation of the Covenant or any other norm of international law. In particular, there is no indication that cyanide gas asphyxiation, which is the method of judicial execution in the State of California, is contrary to the Covenant or international law". Finally, the Government of Canada stated that it had examined "the method of execution for its possible effect on Ng on facts specified to him" and that it came to the conclusion that "there are no facts with respect to Ng which take him out of the general application outlined". In this context, the Government made explicit reference to the Safeguards Guaranteeing Protection of Those Facing the Death Penalty adopted by the Economic and Social Council in its resolution 1984/50 of 25 May 1984 and endorsed by the General Assembly in resolution 39/118 of 14 December 1984. The Government of Canada has thus clearly taken into account a number of important elements in its assessment of whether the method of execution in California might constitute inhuman or degrading treatment.

17. It is also evident from the foregoing that the defendant State has examined the whole issue in depth and did not deal with it in the cursory manner suggested in paragraph 16.3 of the Committee's views. The author and his counsel were perfectly aware of this. Already in his letter of 26 October 1989 addressed to the author's counsel, the Minister of Justice of Canada stated as follows:

> "You have argued that the method employed to carry out capital punishment in California is cruel and inhuman, in itself. I have given consideration to this issue. The method used by California has been in place for a number of years and has found acceptance in the courts of the United States".

18. Apart from the above considerations, which in my view demonstrate that there is no agreed or scientifically proven standard to determine that judicial execution by gas asphyxiation is more cruel and inhuman than other methods of judicial execution, the plea of the author's counsel contained in his submission to the Supreme Court of Canada (prior to Ng's extradition) which was made available to the Committee, in favour of "lethal injection" (as opposed to "lethal gas") speaks for itself.

19. The Committee observes in the present views (paragraph 15.3) - and it has also held in the Kindler case (paragraph 6.4) - that the imposition of the death penalty (although, if I may add my personal view on this matter, capital punishment is in itself regrettable under any point of view and is obviously not in line with fundamental moral and ethic principles prevailing throughout Europe and other parts of the world) is still legally permissible under the Covenant. Logically, therefore, there must be methods of execution that are compatible with the Covenant. Although any judicial execution must be carried out in such a way as to cause the least possible physical and mental suffering (see the Committee's general comment 20 (44) on article 7 of the Covenant), physical and mental suffering will inevitably be one of the consequences of the imposition of the death penalty and its execution. To attempt to establish categories of methods of judicial executions, as long as such methods are not manifestly arbitrary and grossly contrary to the moral values of a democratic society and as long as such methods are based on a uniformly applicable legislation adopted by democratic processes, is futile, as it is futile to attempt to quantify the pain and suffering of any human being subjected to capital punishment. In this connection I should also like to refer to the considerations advanced in paragraph 9 of the joint individual opinion submitted by Mr. Waleed Sadi and myself in the Kindler case (decision of 30 July 1993, appendix).

20. It is therefore only logical that I also agree with the individual opinion expressed by a number of members of the Committee and attached to the present views. Those members conclude that the Committee should not go into details in respect of executions as to whether acute pain of limited duration or less pain of longer duration is preferable and could be a criterion for the finding of a violation.

21. The Committee's finding that the specific method of judicial execution applied in California is tantamount to cruel and inhuman treatment and that accordingly Canada violated article 7 of the Covenant by extraditing Mr. Ng to the United States, is therefore, in my view, without a proper basis.

In the present case the defendant State, Canada, has done its level best to respect its obligations under the Covenant

22. A final word ought to be said as far as Canada's obligations under the Covenant are concerned.

23. While recent developments in the jurisprudence of international organs entrusted with the responsibility of ensuring that individuals' human rights are fully respected by State authorities, suggest an expansion of their monitoring role (see, for example, the judgment of the European Court of Human Rights in the Soering case, paragraph 85; see also, in this context, the remarks on the expanded notion of "victim", paragraph 6 above), the issue of the extent to which, in the area of extradition, a State party to an international human rights treaty must take into account the situation in a receiving State, still remains an open question. I should, therefore, like to repeat what I stated together with Mr. Waleed Sadi in the joint individual opinion in the Kindler case (decision of 30 July 1993, appendix). The same considerations are applicable in the present case.

24. We observed in paragraph 5 of the joint individual opinion that the allegations of the author concerned hypothetical violations of his rights in the United States (after the legality of the extradition had been tested in Canadian Courts, including the Supreme Court of Canada), and unreasonable responsibility was being placed on Canada by requiring it to defend, explain or justify before

the Committee the United States system of administration of justice. I continue to believe that such is indeed unreasonable. Both at the level of the judiciary as well as at the level of administrative proceedings, Canada has given all aspects of Mr. Ng's case the consideration they deserve in the light of its obligations under the Covenant. It has done what can reasonably and in good faith be expected from a State party.

[English original]

Notes

a/ Cherif Bassiouni, International Extradition and World Public Order (Dobbs Ferry, Leyden, 1974), p. 465.

F. Individual opinion submitted by Mr. Nisuke Ando (dissenting)

I am unable to concur with the views of the Committee that "execution by gas asphyxiation ... would not meet the test of 'least possible physical and mental suffering' and constitutes cruel and inhuman [punishment] in violation of article 7 of the Covenant" (paragraph 16.4). In the view of the Committee "the author has provided detailed information that execution by gas asphyxiation may cause prolonged suffering and agony and does not result in death as swiftly as possible, as asphyxiation by cyanide gas may take over 10 minutes" (paragraph 16.3). Thus, the swiftness of death seems to be the very criterion by which the Committee has concluded that execution by gas asphyxiation violates article 7.

In many of the States parties to the Covenant where the death penalty has not been abolished, other methods of execution such as hanging, shooting, electrocution or injection of certain materials are used. Some of them may take a longer time and others shorter than gas asphyxiation, but I wonder if, irrespective of the kind and degree of suffering inflicted on the executed, all those methods that may take over ten minutes are in violation of article 7 and all others that take less are in conformity with it. In other words, I consider that the criteria of permissible suffering under article 7 should not solely depend on the swiftness of death.

The phrase "least possible physical and mental suffering" comes from the Committee's general comment 20 (44) on article 7, which states that the death penalty must be carried out in such a way as to cause the least possible physical and mental suffering. This statement, in fact, implies that there is no method of execution which does not cause any physical or mental suffering and that every method of execution is bound to cause some suffering.

However, I must admit that it is impossible for me to specify which kind of suffering is permitted under article 7 and what degree of suffering is not permitted under the same article. I am totally incapable of indicating any absolute criterion as to the scope of suffering permissible under article 7. What I can say is that article 7 prohibits any method of execution which is intended for prolonging suffering of the executed or causing unnecessary pain to him or her. As I do not believe that gas asphyxiation is so intended, I cannot concur with the Committee's view that execution by gas asphyxiation violates article 7 of the Covenant.

[English original]

G. Individual opinion submitted by Mr. Francisco José Aquilar Urbina (dissenting)

Extradition and the protection afforded by the Covenant

1. In analysing the relationship between the Covenant and extradition, I cannot agree with the Committee that "extradition as such is outside the scope of application of the Covenant" (views, para. 6.1). I consider that it is remiss - and even dangerous, as far as the full enjoyment of the rights set forth in the Covenant is concerned - to make such a statement. In order to do so, the Committee relies on the pronouncement in the Kindler case to the effect that since "it is clear from the travaux préparatoires that it was not intended that article 13 of the Covenant, which provides specific rights relating to the expulsion of aliens lawfully in the territory of a State party, should detract from normal extradition arrangements", a/ extradition would remain outside the scope of the Covenant. In the first place, we have to note that extradition, even though in the broad sense it would amount to expulsion, in a narrow sense would be included within the procedures regulated by article 14 of the Covenant. Although the procedures for ordering the extradition of a person to the requesting State vary from country to country, they can roughly be grouped into three general categories: (a) a purely judicial procedure, (b) an exclusively administrative procedure, or (c) a mixed procedure involving action by the authorities of two branches of the State, the judiciary and the executive. This last procedure is the one followed in Canada. The important point, however, is that the authorities dealing with the extradition proceedings constitute, for this specific case at least, a "tribunal" that applies a procedure which must conform to the provisions of article 14 of the Covenant.

2.1 The fact that the drafters of the International Covenant on Civil and Political Rights did not include extradition in article 13 is quite logical, but on that account alone it cannot be affirmed that their intention was to leave extradition proceedings outside the protection afforded by the Covenant. The fact is, rather, that extradition does not fit in with the legal situation defined in article 13. The essential difference lies, in my opinion, in the fact that this rule refers exclusively to the expulsion of "an alien lawfully in the territory of a State party".

2.2 Extradition is a kind of "expulsion" that goes beyond what is contemplated in the rule. Firstly, extradition is a specific procedure, whereas the rule laid down in article 13 is of a general nature; however, article 13 merely stipulates that expulsion must give rise to a decision in accordance with law, and it is even permissible - in cases where there are compelling reasons of national security - for the alien not to be heard by the competent authority or to have his case reviewed. Secondly, whereas expulsion constitutes a unilateral decision by a State, grounded on reasons that lie exclusively within the competence of that State - provided that they do not violate the State's international obligations, such as those under the Covenant - extradition constitutes an act based upon a request by another State. Thirdly, the rule in article 13 relates exclusively to aliens who are in the territory of a State party to the Covenant, whereas extradition may relate both to aliens and to nationals; indeed, on the basis of its discussions, the Committee has considered the practice of expelling nationals (for example, exile) in general (other than under extradition proceedings) to be contrary to article 12. b/ Fourthly, the rule in article 13 relates to persons who are lawfully in the territory of a country. In the case of extradition, the individuals against whom the proceedings are initiated are not necessarily lawfully within the jurisdiction of a country; on the contrary - and especially if it is borne in mind that article 13 leaves the question of the lawfulness of the alien's presence to national law - in a great many instances, persons who are subject to extradition proceedings have entered the territory of the requested State illegally, as in the case of the author of the communication.

3. Although extradition cannot be considered to be a kind of expulsion within the meaning of article 13 of the Covenant, this does not imply that it is excluded from the scope of the Covenant. Extradition must be strictly adapted in all cases to the rules laid down in the Covenant. Thus the extradition proceedings must follow the rules of due process as required by article 14 and, furthermore, their consequences must not entail a violation of any other provision. Therefore, a State cannot allege that extradition is not covered by the Covenant in order to evade the responsibility that would devolve upon it for the possible absence of protection of the possible victim in a foreign jurisdiction.

The extradition of the author to the United States of America

4. In this particular case, Canada extradited the author of the communication to the United States of America, where he was to stand trial on 19 criminal counts, including 12 murders. It will have to be seen - as the Committee stated in its decision on the admissibility of the communication - whether Canada, in granting Mr. Ng's extradition, exposed him, necessarily and foreseeably, to a violation of the Covenant.

5. The same State party argued that "the author cannot be considered a victim within the meaning of the Optional Protocol, since his allegations are derived from assumptions about possible future events, which may not materialize and which are dependent on the law and actions of the authorities of the United States" (views, para. 4.2). Although it is impossible to predict a future event, it must be understood that whether or not a person is a victim depends on whether that event is foreseeable - or, in other words, on whether, according to common sense, it may happen, in the absence of exceptional events that prevent it from occurring - or necessary - in other words, it will inevitably occur, unless exceptional events prevent it from happening. The Committee itself, in concluding that Canada had violated article 7 (views, para. 17), found that the author of the communication would necessarily and foreseeably be executed. For that reason, I shall not discuss the issue of foreseeability and necessity except to say that I agree with the views of the majority.

6. Now, with regard to the exceptional circumstances mentioned by the State party (views, para. 4.4), the most important aspect is that, according to the assertions of the State party itself, they refer to the application of the death penalty. In my opinion, the vital point is the link between the application of the death penalty and the protection given to the lives of persons within the jurisdiction of the State of Canada. For those persons, the death penalty constitutes, in itself, a special circumstance. For that reason - and in so far as the death penalty can be considered as being necessarily and foreseeably applicable - Canada had a duty to seek assurances that Charles Chitat Ng would not be executed.

7. The problem that arises with the extradition of the author of the communication to the United States without any assurances having been requested is that he was deprived of the enjoyment of his rights under the Covenant. Article 6, paragraph 2, of the Covenant, although it does not prohibit the death penalty, cannot be understood as an unrestricted authorization for it. In the first place, it has to be viewed in the light of paragraph 1, which declares

that every human being has the inherent right to life. It is an unconditional right admitting of no exception. In the second place, it constitutes - for those States which have not abolished the death penalty - a limitation on its application, in so far as it may be imposed only for the most serious crimes. For those States which have abolished the death penalty it represents an insurmountable barrier. The spirit of this article is to eliminate the death penalty as a punishment, and the limitations which it imposes are of an absolute nature.

8. In this connection, when Mr. Ng entered Canadian territory he already enjoyed an unrestricted right to life. By extraditing him without having requested assurances that he would not be executed, Canada denied him the protection which he enjoyed and exposed him necessarily and foreseeably to being executed in the opinion of the majority of the Committee, which I share in this regard. Canada has therefore violated article 6 of the Covenant.

9. Further, Canada's misinterpretation of the rule in article 6, paragraph 2, of the International Covenant on Civil and Political Rights raises the question of whether it has also violated article 5, specifically paragraph 2 thereof. The Government of Canada has interpreted article 6, paragraph 2, as authorizing the death penalty. For that reason, it has found that Mr. Charles Chitat Ng's extradition, even though he will necessarily be sentenced to death and will foreseeably be executed, would not be prohibited by the Covenant, since the latter would authorize the application of the death penalty. In making such a misinterpretation of the Covenant, the State party asserts that the extradition of the author of the communication would not be contrary to the Covenant. In this connection, Canada has denied Mr. Charles Chitat Ng a right which he enjoyed under its jurisdiction, adducing that the Covenant would give a lesser protection than internal law - in other words, that the International Covenant on Civil and Political Rights would recognize the right to life in a lesser degree than Canadian legislation. In so far as the misinterpretation of article 6, paragraph 2, has led Canada to consider that the Covenant recognizes the right to life in a lesser degree than its domestic legislation and has used that as a pretext to extradite the author to a jurisdiction where he will certainly be executed, Canada has also violated article 5, paragraph 2, of the Covenant.

10. I have to insist that Canada has misinterpreted article 6, paragraph 2, and that, when it abolished the death penalty, it became impossible for it to apply that penalty directly in its territory, except for the military offences for which it is still in force, or indirectly through the handing over to another State of a person who runs the risk of being executed or who will be executed. Since it abolished the death penalty, Canada has to guarantee the right to life of all persons within its jurisdiction, without any limitation.

11. With regard to the possible violation of article 7 of the Covenant, I do not concur with the Committee's finding that "in the instant case and on the basis of the information before it, the Committee concludes that execution by gas asphyxiation, should the death penalty be imposed on the author, would not meet the test of least possible physical and mental suffering and constitutes cruel and inhuman treatment, in violation of article 7 of the Covenant" (views, para. 16.4). I cannot agree with the view that the execution of the death penalty constitutes cruel and inhuman treatment only in these circumstances. On the contrary, I consider that the death penalty as such constitutes treatment that is cruel, inhuman and degrading and hence contrary to article 7 of the International Covenant on Civil and Political Rights. Nevertheless, in the present case, it is my view that the consideration of the application of the

death penalty is subsumed by the violation of article 6, and I do not find that article 7 of the Covenant has been specifically violated.

12. One final aspect to be dealt with is the way in which Mr. Ng was extradited. No notice was taken of the request made by the Special Rapporteur on New Communications, under rule 86 of the rules of procedure of the Human Rights Committee, that the author should not be extradited while the case was under consideration by the Committee. On ratifying the Optional Protocol, Canada undertook, with the other States parties, to comply with the procedures followed in connection therewith. In extraditing Mr. Ng without taking into account the Special Rapporteur's request, Canada failed to display the good faith which ought to prevail among the parties to the Protocol and the Covenant.

13. Moreover, this fact gives rise to the possibility that there may also have been a violation of article 26 of the Covenant. Canada has given no explanation as to why the extradition was carried out so rapidly once it was known that the author had submitted a communication to the Committee. By its action in failing to observe its obligations to the international community, the State party has prevented the enjoyment of the rights which the author ought to have had as a person under Canadian jurisdiction in relation to the Optional Protocol. In so far as the Optional Protocol forms part of the Canadian legal order, all persons under Canadian jurisdiction enjoy the right to submit communications to the Human Rights Committee so that it may hear their complaints. Since it appears that Mr. Charles Chitat Ng was extradited on account of his nationality, c/ and in so far as he has been denied the possibility of enjoying its protection in accordance with the Optional Protocol, I find that the State party has also violated article 26 of the Covenant.

14. In conclusion, I find Canada to be in violation of articles 5, paragraph 2, 6 and 26 of the International Covenant on Civil and Political Rights.

San Rafael de Escazú, Costa Rica
1 December 1993

[Spanish original]

Notes

a/ Official Records of the General Assembly, Forty-eighth Session, Supplement No. 40 (A/48/40), annex XII.U, communication No. 470/1991 (Joseph Kindler v. Canada), views adopted on 30 July 1993, para. 6.6.

b/ In this connection, see the summary records of the Committee's recent discussions regarding Zaire and Burundi, in relation to the expulsion of nationals, and Venezuela in relation to the continuing existence, in criminal law. of exile as a penalty.

c/ The various passages in the reply which refer to the relations between Canada and the United States, the 4,800 kilometres of unguarded frontier between the two countries and the growing number of extradition applications by the United States to Canada should be taken into account. The State party has indicated that United States fugitives cannot be permitted to take the non-extradition of the author in the absence of assurances as an incentive to flee to Canada. In this connection, the arguments of the State party were identical to those put forward in relation to communication No. 470/1991.

H. Individual opinion submitted by Ms. Christine Chanet (dissenting)

As regards the application of article 6 in the present case, I can only repeat the terms of my separate opinion expressed in the case of John Kindler v. Canada (communication No. 470/1991).

Consequently, I am unable to accept the statement, in paragraph 16.2 of the decision, that "article 6, paragraph 2, permits the imposition of capital punishment". In my view, the text of the Covenant does not authorize the imposition, or restoration, of capital punishment in those countries which have abolished it; it simply sets conditions with which the State must necessarily comply when capital punishment exists.

Drawing inferences from a de facto situation cannot, in law, be assimilated to an authorization.

As regards article 7, I share the Committee's conclusion that this provision has been violated in the present case.

However, I consider that the Committee engages in questionable discussion when, in paragraph 16.3, it assesses the suffering caused by cyanide gas and takes into consideration the duration of the agony, which it deems unacceptable when it lasts for over 10 minutes.

Should it be concluded, conversely, that the Committee would find no violation of article 7 if the agony lasted nine minutes?

By engaging in this debate, the Committee finds itself obliged to take positions that are scarcely compatible with its role as a body monitoring an international human rights instrument.

A strict interpretation of article 6 along the lines I have set out previously which would exclude any "authorization" to maintain or restore the death penalty, would enable the Committee to avoid this intractable debate on the ways in which the death penalty is carried out in the States parties.

[French original]

DD. Communication No. 484/1991, H. J. Pepels v. the Netherlands (views adopted on 15 July 1994, fifty-first session)

Submitted by:	H. J. Pepels (represented by counsel)
Victim:	The author
State party:	The Netherlands
Date of communication:	25 November 1991
Date of decision on admissibility:	19 March 1993

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 15 July 1994,

Having concluded its consideration of communication No. 484/1991, submitted to the Human Rights Committee by Mr. H. J. Pepels under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, his counsel and the State party,

Adopts its views under article 5, paragraph 4, of the Optional Protocol.

1. The author of the communication is H. J. Pepels, a Netherlands citizen, residing in Stein, the Netherlands. He claims to be a victim of a violation by the Netherlands of article 26 *juncto* articles 3 and 5 of the Covenant. He is represented by counsel.

The facts as presented

2.1 The author became a widower on 12 July 1978 and had to assume sole responsibility for the upbringing of his four young children. The General Widows' and Orphans' Act (*Algemene Weduwen- en Wezenwet*) only provided for benefits to widows who fulfilled certain requirements. Widows with unmarried children living at home would qualify for the benefits, which were not dependent on income. Widowers, however, were not entitled to benefits under the AWW. Faced with this situation, the author did not apply for benefits.

2.2 Ten years later, on 7 December 1988, the Central Board of Appeal (Centrale Raad van Beroep), the highest court in social security cases, decided that, despite the text of the law, widowers were also entitled to benefits under the General Widows' and Orphans' Act, since the legal provisions were considered to be in violation of the principle of non-discrimination.

2.3 The author then applied for benefits under the Act. On 14 March 1989, he was informed that benefits would be granted to him as of 1 December 1987, pursuant to article 25(3) of the law, which provides for the retroactive grant of benefits for a period of up to one year preceding the date of application. The author appealed the decision to grant him benefits as of 1 December 1987, claiming that special circumstances existed within the meaning of article 25(5) of the Act. Article 25(5) of the Act provides that if special circumstances exist, retroactive benefits can be granted for a longer period. The Board of Appeal (Raad van Beroep), on 30 March 1990, agreed that special circumstances should be taken into account and that the author should be granted retroactive benefits. The Sociale Verzekeringsbank, the body responsible for implementing the Act, then appealed this decision to the Central Board of Appeal.

2.4 On 31 January 1991, the Central Board of Appeal decided that, although the Act was inconsistent with article 26 of the Covenant (which entered into force for the Netherlands on 11 March 1979), benefits could be granted to widowers only as of 23 December 1984, the ultimate date established by the Third Directive of the European Community (EC) for the elimination of discrimination between men and women within the community. As regards the retroactivity of benefits, the Central Board of Appeal considered that unfamiliarity with rights could be a factor in deciding whether special circumstances existed to extend the retroactivity for a period longer than a year. It added, however, that it could agree to a policy that would restrict the extra retroactivity to cases of a specifically serious character.

2.5 On the basis of the decision of the Central Board of Appeal, the Sociale Verzekeringsbank decided not to change the date (1 December 1987) as of which benefits would be granted to the author. The author's further appeal against this decision was dismissed by the Maastricht District Court.

The complaint

3.1 The author claims that the decision not to grant him full retroactive benefits violates article 26 *juncto* articles 3 and 5 of the Covenant.

3.2 It is submitted that the date of 23 December 1984 is arbitrary, since it was only chosen for practical reasons. Benefits under the General Widows' and Orphans' Act are not covered by the Third Directive of the EC, which prescribes the abolition of all discrimination between men and women as of 23 December 1984. The author further submits that there is no legal ground for a transitional period in the direct applicability of article 26 of the Covenant. He states that the 13 years between 1966 (when the State party signed the Covenant) and 1979 (when the Covenant entered into force for the State party) should have been sufficient for the Government to adjust its legislation. He submits that a gradual implementation of treaty regulations on non-discrimination is only relevant as far as article 2, paragraph 2, of the International Covenant on Economic, Social and Cultural Rights is concerned, but that the application of article 26 of the International Covenant on Civil and Political Rights is not similarly restricted. He notes moreover that already in 1973, the *Nederlandse Gezinsraad* (Dutch Family Council), an official advisory body to the Government, recommended the granting of benefits under the Act to widowers.

3.3 In this context, the author refers to the views of the Human Rights Committee in case No. 172/1984 (*Broeks v. the Netherlands*). [a] He also refers to a Government memorandum regarding the entry into force of the Covenant, in which the Government stated unequivocally that there was no reason to deny direct applicability of part III of the Covenant. Furthermore, the author states that article 26 of the Covenant is reflected in the Netherlands constitution, which prohibits discrimination on the ground, *inter alia*, of gender.

3.4 The author states that article 26 of the Covenant is directly applicable in the Netherlands as of 11 March 1979, and that the refusal of benefits to widowers violates this article as of that date.

The Committee's decision on admissibility

4. At its forty-seventh session, the Committee considered the admissibility of the communication. It noted that the State party had confirmed that all domestic remedies had been exhausted and that it had raised no other objections to admissibility. On 19 March 1993, the Committee declared the communication admissible in so far as it might raise issues under article 26 of the Covenant.

The State party's observations on the merits and the author's comments thereon

5.1 By submission dated 24 February 1994, the State party explains that the award of pensions to widows alone and not to widowers derived from the fact that, in 1959, when the General Widows' and Orphans' Act was enacted, the prevailing norm in society at large was that the husband was the breadwinner while the wife was responsible for running the household and taking care of the children. According to the State party, there was therefore no reason for the scheme to cover widowers too, as it was assumed that a widower would be able to earn his own living. In the opinion of the State party, the principle of equality embodied in article 26 of the Covenant was therefore not being violated, because the different treatment could be justified on objective and reasonable grounds.

5.2 The State party acknowledges that social realities have changed and that the different treatment between widows and widowers can no longer be justified in present-day society. It submits that it has decided to introduce new legislation to replace the existing Act, regulating pension entitlements for both widows and widowers. The State party, however, contends that one cannot apply the present standards with respect to article 26 of the Covenant to past facts and circumstances, when other social realities were relevant. It argues that past facts and events should be judged in the light of the social reality at that time.

5.3 The State party submits that the decision of the Central Board of Appeal that article 26 of the Covenant had to be complied with as from 23 December 1984, and that benefits could not be granted retroactively for a period prior to that date, is reasonable. It argues that social security legislation makes distinctions between different categories of persons in order to achieve social justice. Since social trends develop gradually, the realization that pension entitlements can no longer be restricted to widows also took place gradually. Since the legislation necessarily lags behind social developments in society, the State party argues that it is reasonable to allow for a certain amount of time to adjust legislation and practice before concluding that they are in violation of the Covenant. In this context, the State party refers to the Committee's decision in communication No. 501/1992 b/ and to the individual opinion of three members of the Committee in the Committee's views with regard to communication No. 395/1990. c/

5.4 The State party submits that it regularly reviews its social security legislation in the light of changes in social attitudes and structures. It refers to its decision to introduce new legislation abolishing the legal distinction between widows and widowers with regard to pensions, and states that pending enactment of the bill, equal treatment is at present accorded to widows and widowers on the basis of case law.

6.1 In his comments dated 12 April 1994, the author argues that even if in 1959 social reality was such that there was no reason to apply the Act to widowers, in 1979 this situation had already changed. The author refers to his initial communication and quotes from a 1973 report of the Family Council, where the extension of the applicability of the Act to widowers was recommended on an urgent basis. According to the author, there was therefore no longer a valid reason in 1979, when the Covenant entered into force for the Netherlands, to distinguish between widows and widowers, in violation of article 26 of the Covenant. In this context, the author refers to the prior jurisprudence of the Committee, d/ in which the Committee held that equality before the law implies that any distinctions in the enjoyment of benefits must be based on reasonable and objective criteria. He argues that, with regard to pensions for widows and widowers, the distinction between men and women in 1979 was no longer based on reasonable and objective criteria.

6.2 The author further argues that during the process of ratification of the Covenant, the Government informed Parliament that the rights protected in the Covenant would have direct applicability in the Netherlands, in the sense that they could be directly invoked before the courts. The author further notes that the Government explained that the long period between signing the Covenant and ratifying it had been necessary to bring the legislation and existing practice in conformity with the provisions of the Covenant. On this basis, the author argues that the State party now is estopped from claiming that it needed an additional period of time to adjust its social security legislation in order to bring it in line with the Covenant. In this context, the author reiterates that the date of 23 December 1984 is irrelevant for the determination of direct applicability of Covenant rights in the Netherlands.

Issues and proceedings before the Committee

7.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

7.2 The Committee refers to its earlier jurisprudence and recalls that, while article 26 requires that discrimination be prohibited by law and that all persons be guaranteed equal protection against discrimination, it does not concern itself with which matters may be regulated by law. Thus, article 26 does not of itself require States parties either to provide social security benefits or to provide them retroactively in respect of the date of application. However, when such benefits are regulated by law, then such law must comply with article 26 of the Covenant.

7.3 The Committee notes that, while the law in question makes a distinction between widows and widowers, this distinction has been inoperative since 7 December 1988, when the Central Board of Appeal found it unreasonable and in violation of the principle of equality. In other words, the distinction no longer applied when Mr. Pepels requested benefits under the General Widows' and Orphans' Act on 14 December 1988 and was granted benefits, retroactively, as from 1 December 1987.

7.4 Mr. Pepels claims that the law in question, as applied prior to the decision of the Central Board of Appeal, was inconsistent with article 26 of the Covenant. However, he did not attempt to challenge the law at the material time by claiming benefits, as he now indicates would have been open to him, inter alia by virtue of article 26 of the Covenant. Thus, the contested provisions of the law were never applied in his particular case. In the circumstances, the Committee has no grounds to pronounce itself on the author's retroactive claim for the period between 11 March 1979 and 1 December 1987.

7.5 The Committee observes that since December 1988, benefits under the Act are granted to widows and widowers alike. The Act provides for the grant of retroactive benefits for up to one year preceding the date of application; only in exceptional circumstances can benefits be granted as from an earlier date. This provision is being applied to men and women alike, and the information before the Committee does not show that Mr. Pepels was treated differently than others. The Committee, therefore, concludes that the way in which the law is applied since 1988 does not reveal a violation of article 26 of the Covenant.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it do not reveal a violation by the State party of any of the articles of the Covenant.

[Adopted in English, French and Spanish, the English text being the original version.]

Notes

a/ Official Records of the General Assembly, Forty-second Session, Supplement No. 40 (A/42/40), annex VIII.B, views adopted on 9 April 1987.

b/ Ibid., Forty-eighth Session, Supplement No. 40 (A/48/40), annex XIII.P, J. H. W. v. the Netherlands, declared inadmissible on 16 July 1993.

c/ Ibid., Forty-seventh Session, Supplement No. 40 (A/47/40), annex IX.P, M. T. Sprenger v. the Netherlands, views adopted on 31 March 1992.

d/ See, inter alia, the Committee's views with regard to communication No. 395/1990 (M. T. Sprenger v. the Netherlands), views adopted on 31 March 1992, paragraph 7.2 (Official Records of the General Assembly, Forty-eighth Session, Supplement No. 40 (A/48/40), annex IX.P).

EE. Communication No. 488/1992, Nicholas Toonen v. Australia (views adopted on 31 March 1994, fiftieth session)*

Submitted by: Nicholas Toonen

Victim: The author

State party: Australia

Date of communication: 25 December 1991 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 31 March 1994,

Having concluded its consideration of communication No. 488/1992, submitted to the Human Rights Committee by Mr. Nicholas Toonen under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts its views under article 5, paragraph 4, of the Optional Protocol.

1. The author of the communication is Nicholas Toonen, an Australian citizen born in 1964, currently residing in Hobart in the state of Tasmania, Australia. He is a leading member of the Tasmanian Gay Law Reform Group and claims to be a victim of violations by Australia of articles 2, paragraph 1; 17; and 26 of the International Covenant on Civil and Political Rights.

The facts as submitted by the author

2.1 The author is an activist for the promotion of the rights of homosexuals in Tasmania, one of Australia's six constitutive states. He challenges two provisions of the Tasmanian Criminal Code, namely, sections 122 (a) and (c) and 123, which criminalize various forms of sexual contact between men, including all forms of sexual contact between consenting adult homosexual men in private.

2.2 The author observes that the above sections of the Tasmanian Criminal Code empower Tasmanian police officers to investigate intimate aspects of his private life and to detain him, if they have reason to believe that he is involved in sexual activities which contravene the above sections. He adds that the Director of Public Prosecutions announced, in August 1988, that proceedings pursuant to sections 122 (a) and (c) and 123 would be initiated if there was sufficient evidence of the commission of a crime.

2.3 Although in practice the Tasmanian police has not charged anyone either with "unnatural sexual intercourse" or "intercourse against nature" (section 122) nor with "indecent practice between male persons" (section 123) for several years, the author argues that because of his long-term relationship with another man, his active lobbying of Tasmanian politicians and the reports about his activities in the local media, and because of his activities as a gay rights activist and gay HIV/AIDS worker, his private life and his liberty are threatened by the continued existence of sections 122 (a) and (c) and 123 of the Criminal Code.

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* The text of an individual opinion submitted by Mr. Bertil Wennergren is appended.

2.4 Mr. Toonen further argues that the criminalization of homosexuality in private has not permitted him to expose openly his sexuality and to publicize his views on reform of the relevant laws on sexual matters, as he felt that this would have been extremely prejudicial to his employment. In this context, he contends that sections 122 (a) and (c) and 123 have created the conditions for discrimination in employment, constant stigmatization, vilification, threats of physical violence and the violation of basic democratic rights.

2.5 The author observes that numerous "figures of authority" in Tasmania have made either derogatory or downright insulting remarks about homosexual men and women over the past few years. These include statements made by members of the Lower House of Parliament, municipal councillors (such as "representatives of the gay community are no better than Saddam Hussein" and "the act of homosexuality is unacceptable in any society, let alone a civilized society"), of the church and of members of the general public, whose statements have been directed against the integrity and welfare of homosexual men and women in Tasmania (such as "[g]ays want to lower society to their level" and "You are 15 times more likely to be murdered by a homosexual than a heterosexual ..."). In some public meetings, it has been suggested that all Tasmanian homosexuals should be rounded up and "dumped" on an uninhabited island, or be subjected to compulsory sterilization. Remarks such as these, the author affirms, have had the effect of creating constant stress and suspicion in what ought to be routine contacts with the authorities in Tasmania.

2.6 The author further argues that Tasmania has witnessed, and continues to witness, a "campaign of official and unofficial hatred" against homosexuals and lesbians. This campaign has made it difficult for the Tasmanian Gay Law Reform Group to disseminate information about its activities and advocate the decriminalization of homosexuality. Thus, in September 1988, for example, the Group was refused permission to put up a stand in a public square in the city of Hobart, and the author claims that he, as a leading protester against the ban, was subjected to police intimidation.

2.7 Finally, the author argues that the continued existence of sections 122 (a) and (c) and 123 of the Criminal Code of Tasmania continue to have profound and harmful impacts on many people in Tasmania, including himself, in that it fuels discrimination and violence against and harassment of the homosexual community of Tasmania.

The complaint

3.1 The author affirms that sections 122 and 123 of the Tasmanian Criminal Code violate articles 2, paragraph 1; 17; and 26 of the Covenant because:

(a) They do not distinguish between sexual activity in private and sexual activity in public and bring private activity into the public domain. In their enforcement, these provisions result in a violation of the right to privacy, since they enable the police to enter a household on the mere suspicion that two consenting adult homosexual men may be committing a criminal offence. Given the stigma attached to homosexuality in Australian society (and especially in Tasmania), the violation of the right to privacy may lead to unlawful attacks on the honour and the reputation of the individuals concerned;

(b) They distinguish between individuals in the exercise of their right to privacy on the basis of sexual activity, sexual orientation and sexual identity;

(c) The Tasmanian Criminal Code does not outlaw any form of homosexual activity between consenting homosexual women in private and only some forms of consenting heterosexual activity between adult men and women in private. That the laws in question are not currently enforced by the judicial authorities of Tasmania should not be taken to mean that homosexual men in Tasmania enjoy effective equality under the law.

3.2 For the author, the only remedy for the rights infringed by sections 122 (a) and (c) and 123 of the Criminal Code through the criminalization of all forms of sexual activity between consenting adult homosexual men in private would be the repeal of these provisions.

3.3 The author submits that no effective remedies are available against sections 122 (a) and (c) and 123. At the legislative level, state jurisdictions have primary responsibility for the enactment and enforcement of criminal law. As the Upper and Lower Houses of the Tasmanian Parliament have been deeply divided over the decriminalization of homosexual activities and reform of the Criminal Code, this potential avenue of redress is said to be ineffective. The author further observes that effective administrative remedies are not available, as they would depend on the support of a majority of members of both Houses of Parliament, support which is lacking. Finally, the author contends that no judicial remedies for a violation of the Covenant are available, as the Covenant has not been incorporated into Australian law, and Australian courts have been unwilling to apply treaties not incorporated into domestic law.

The State party's information and observations

4.1 The State party did not challenge the admissibility of the communication on any grounds, while reserving its position on the substance of the author's claims.

4.2 The State party notes that the laws challenged by Mr. Toonen are those of the state of Tasmania and only apply within the jurisdiction of that state. Laws similar to those challenged by the author once applied in other Australian jurisdictions but have since been repealed.

The Committee's decision on admissibility

5.1 During its forty-sixth session, the Committee considered the admissibility of the communication. As to whether the author could be deemed a "victim" within the meaning of article 1 of the Optional Protocol, it noted that the legislative provisions challenged by the author had not been enforced by the judicial authorities of Tasmania for a number of years. It considered, however, that the author had made reasonable efforts to demonstrate that the threat of enforcement and the pervasive impact of the continued existence of these provisions on administrative practices and public opinion had affected him and continued to affect him personally, and that they could raise issues under articles 17 and 26 of the Covenant. Accordingly, the Committee was satisfied that the author could be deemed a victim within the meaning of article 1 of the Optional Protocol, and that his claims were admissible _ratione temporis_.

5.2 On 5 November 1992, therefore, the Committee declared the communication admissible inasmuch as it appeared to raise issues under articles 17 and 26 of the Covenant.

The State party's observations on the merits and author's comments thereon

6.1 In its submission under article 4, paragraph 2, of the Optional Protocol, dated 15 September 1993, the State party concedes that the author has been a victim of arbitrary interference with his privacy, and that the legislative provisions challenged by him cannot be justified on public health or moral grounds. It incorporates into its submission the observations of the government of Tasmania, which denies that the author has been the victim of a violation of the Covenant.

6.2 With regard to article 17, the Federal Government notes that the Tasmanian government submits that article 17 does not create a "right to privacy" but only a right to freedom from arbitrary or unlawful interference with privacy, and that as the challenged laws were enacted by democratic process, they cannot be an unlawful interference with privacy. The Federal Government, after reviewing the travaux préparatoires of article 17, subscribes to the following definition of "private": "matters which are individual, personal, or confidential, or which are kept or removed from public observation". The State party acknowledges that based on this definition, consensual sexual activity in private is encompassed by the concept of "privacy" in article 17.

6.3 As to whether sections 122 and 123 of the Tasmanian Criminal Code "interfere" with the author's privacy, the State party notes that the Tasmanian authorities advised that there is no policy to treat investigations or the prosecution of offences under the disputed provisions any differently from the investigation or prosecution of offences under the Tasmanian Criminal Code in general, and that the most recent prosecution under the challenged provisions dates back to 1984. The State party acknowledges, however, that in the absence of any specific policy on the part of the Tasmanian authorities not to enforce the laws, the risk of the provisions being applied to Mr. Toonen remains, and that this risk is relevant to the assessment of whether the provisions "interfere" with his privacy. On balance, the State party concedes that Mr. Toonen is personally and actually affected by the Tasmanian laws.

6.4 As to whether the interference with the author's privacy was arbitrary or unlawful, the State party refers to the travaux préparatoires of article 17 and observes that the drafting history of the provision in the Commission on Human Rights appears to indicate that the term "arbitrary" was meant to cover interferences which, under Australian law, would be covered by the concept of "unreasonableness". Furthermore, the Human Rights Committee, in its general comment 16 (32) on article 17, states that the "concept of arbitrariness is intended to guarantee that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be ... reasonable in the particular circumstances". a/ On the basis of this and the Committee's jurisprudence on the concept of "reasonableness", the State party interprets "reasonable" interferences with privacy as measures which are based on reasonable and objective criteria and which are proportional to the purpose for which they are adopted.

6.5 The State party does not accept the argument of the Tasmanian authorities that the retention of the challenged provisions is partly motivated by a concern to protect Tasmania from the spread of HIV/AIDS, and that the laws are justified on public health and moral grounds. This assessment in fact goes against the National HIV/AIDS Strategy of the Government of Australia, which emphasizes that laws criminalizing homosexual activity obstruct public health programmes promoting safer sex. The State party further disagrees with the Tasmanian authorities' contention that the laws are justified on moral grounds, noting that moral issues were not at issue when article 17 of the Covenant was drafted.

6.6 None the less, the State party cautions that the formulation of article 17 allows for some infringement of the right to privacy if there are reasonable grounds, and that domestic social mores may be relevant to the reasonableness of an interference with privacy. The State party observes that while laws penalizing homosexual activity existed in the past in other Australian states, they have since been repealed with the exception of Tasmania. Furthermore, discrimination on the basis of homosexuality or sexuality is unlawful in three of six Australian states and the two self-governing internal Australian territories. The Federal Government has declared sexual preference to be a ground of discrimination that may be invoked under ILO Convention No. 111 (Discrimination in Employment or Occupation Convention), and has created a mechanism through which complaints about discrimination in employment on the basis of sexual preference may be considered by the Australian Human Rights and Equal Opportunity Commission.

6.7 On the basis of the above, the State party contends that there is now a general Australian acceptance that no individual should be disadvantaged on the basis of his or her sexual orientation. Given the legal and social situation in all of Australia except Tasmania, the State party acknowledges that a complete prohibition on sexual activity between men is unnecessary to sustain the moral fabric of Australian society. On balance, the State party "does not seek to claim that the challenged laws are based on reasonable and objective criteria".

6.8 Finally, the State party examines, in the context of article 17, whether the challenged laws are a proportional response to the aim sought. It does not accept the argument of the Tasmanian authorities that the extent of interference with personal privacy occasioned by sections 122 and 123 of the Tasmanian Criminal Code is a proportional response to the perceived threat to the moral standards of Tasmanian society. In this context, it notes that the very fact that the laws are not enforced against individuals engaging in private, consensual sexual activity indicates that the laws are not essential to the protection of that society's moral standards. In the light of all the above, the State party concludes that the challenged laws are not reasonable in the circumstances, and that their interference with privacy is arbitrary. It notes that the repeal of the laws has been proposed at various times in the recent past by Tasmanian governments.

6.9 In respect of the alleged violation of article 26, the State party seeks the Committee's guidance as to whether sexual orientation may be subsumed under the term "... or other status" in article 26. In this context, the Tasmanian authorities concede that sexual orientation is an "other status" for the purposes of the Covenant. The State party itself, after review of the travaux préparatoires, the Committee's general comment on articles 2 and 26 and its jurisprudence under these provisions, contends that there "appears to be a strong argument that the words of the two articles should not be read restrictively". The formulation of the provisions "without distinction of any kind, such as" and "on any ground such as" support an inclusive rather than exhaustive interpretation. While the travaux préparatoires do not provide specific guidance on this question, they also appear to support this interpretation.

6.10 The State party continues that if the Committee considers sexual orientation as "other status" for purposes of the Covenant, the following issues must be examined:

(a) Whether Tasmanian laws draw a distinction on the basis of sex or sexual orientation;

(b) Whether Mr. Toonen is a victim of discrimination;

(c) Whether there are reasonable and objective criteria for the distinction;

(d) Whether Tasmanian laws are a proportional means to achieve a legitimate aim under the Covenant.

6.11 The State party concedes that section 123 of the Tasmanian Criminal Code clearly draws a distinction on the basis of sex, as it prohibits sexual acts only between males. If the Committee were to find that sexual orientation is an "other status" within the meaning of article 26, the State party would concede that this section draws a distinction on the basis of sexual orientation. As to the author's argument that it is necessary to consider the impact of sections 122 and 123 together, the State party seeks the Committee's guidance on "whether it is appropriate to consider section 122 in isolation or whether it is necessary to consider the combined impact of sections 122 and 123 on Mr. Toonen".

6.12 As to whether the author is a victim of discrimination, the State party concedes, as referred to in paragraph 6.3 above, that the author is actually and personally affected by the challenged provisions, and accepts the general proposition that legislation does affect public opinion. However, the State party contends that it has been unable to ascertain whether all instances of anti-homosexual prejudice and discrimination referred to by the author are traceable to the effect of sections 122 and 123.

6.13 Concerning the issue of whether the differentiation in treatment in sections 122 and 123 is based on reasonable and objective criteria, the State party refers, mutatis mutandis, to its observations made in respect of article 17 (paragraphs 6.4 to 6.8 above). In a similar context, the State party takes issue with the argument of the Tasmanian authority that the challenged laws do not discriminate between classes of citizens but merely identify acts which are unacceptable to the Tasmanian community. This, according to the State party, inaccurately reflects the domestic perception of the purpose or the effect of the challenged provisions. While they specifically target acts, their impact is to distinguish an identifiable class of individuals and to prohibit certain of their acts. Such laws thus are clearly understood by the community as being directed at male homosexuals as a group. Accordingly, if the Committee were to find the Tasmanian laws discriminatory which interfere with privacy, the State party concedes that they constitute a discriminatory interference with privacy.

6.14 Finally, the State party examines a number of issues of potential relevance in the context of article 26. As to the concept of "equality before the law" within the meaning of article 26, the State party argues that the complaint does not raise an issue of procedural inequality. As regards the issue of whether sections 122 and 123 discriminate in "equal protection of the law", the State party acknowledges that if the Committee were to find the laws to be discriminatory, they would discriminate in the right to equal protection of the law. Concerning whether the author is a victim of prohibited discrimination, the State party concedes that sections 122 and 123 do have an actual effect on the author and his complaint does not, as affirmed by the Tasmanian authorities, constitute a challenge in abstracto to domestic laws.

7.1 In his comments, the author welcomes the State party's concession that sections 122 and 123 violate article 17 of the Covenant but expresses concern that the argumentation of the Government of Australia is entirely based on the fact that he is threatened with prosecution under the aforementioned provisions and does not take into account the general adverse effect of the laws on himself. He further expresses concern, in the context of the "arbitrariness" of the interference with his privacy, that the State party has found it difficult to ascertain with certainty whether the prohibition on private homosexual activity represents the moral position of a significant portion of the Tasmanian populace. He contends that, in fact, there is significant popular and institutional support for the repeal of Tasmania's anti-gay criminal laws, and provides a detailed list of associations and groups from a broad spectrum of Australian and Tasmanian society, as well as a detailed survey of national and international concern about gay and lesbian rights in general and Tasmania's anti-gay statutes in particular.

7.2 In response to the Tasmanian authorities' argument that moral considerations must be taken into account when dealing with the right to privacy, the author notes that Australia is a pluralistic and multi-cultural society whose citizens have different and at times conflicting moral codes. In these circumstances it must be the proper role of criminal laws to entrench these different codes as little as possible; in so far as some values must be entrenched in criminal codes, these values should relate to human dignity and diversity.

7.3 As to the alleged violations of articles 2, paragraph 1, and 26, the author welcomes the State party's willingness to follow the Committee's guidance on the interpretation of these provisions but regrets that the State party has failed to give its own interpretation of these provisions. This, he submits, is inconsistent with the domestic views of the Government of Australia on these provisions, as it has made clear domestically that it interprets them to guarantee freedom from discrimination and equal protection of the law on grounds of sexual orientation. He proceeds to review recent developments in Australia on the status of sexual orientation in international human rights law and notes that before the Main Committee of the World Conference on Human Rights, Australia made a statement which "remains the strongest advocacy of ... gay rights by any Government in an international forum". The author submits that Australia's call for the proscription, at the international level, of discrimination on the grounds of sexual preference is pertinent to his case.

7.4 Mr. Toonen further notes that in 1994, Australia will raise the issue of sexual orientation discrimination in a variety of forums: "It is understood that the National Action Plan on Human Rights which will be tabled by Australia in the Commission on Human Rights early next year will include as one of its objectives the elimination of discrimination on the grounds of sexual orientation at an international level".

7.5 In the light of the above, the author urges the Committee to take account of the fact that the State party has consistently found that sexual orientation is a protected status in international human rights law and, in particular, constitutes an "other status" for purposes of articles 2, paragraph 1, and 26. The author notes that a precedent for such a finding can be found in several judgements of the European Court of Human Rights. b/

7.6 As to the discriminatory effect of sections 122 and 123 of the Tasmanian Criminal Code, the author reaffirms that the combined effect of the provisions is discriminatory because together they outlaw all forms of intimacy between men. Despite its apparent neutrality, section 122 is said to be by itself discriminatory. In spite of the gender neutrality of Tasmanian laws against "unnatural sexual intercourse", this provision, like similar and now repealed laws in different Australian states, has been enforced far more often against men engaged in homosexual activity than against men or women who are heterosexually active. At the same time, the provision criminalizes an activity practised more often by men sexually active with other men than by men or women who are heterosexually active. The author contends that in its general comment on article 26 and in some of its views, the Human Rights Committee itself has accepted the notion of "indirect discrimination". c/

7.7 Concerning the absence of "reasonable and objective criteria" for the differentiation operated by sections 122 and 123, Mr. Toonen welcomes the State party's conclusion that the provisions are not reasonably justified on public health or moral grounds. At the same time, he questions the State party's ambivalence about the moral perceptions held among the inhabitants of Tasmania.

7.8 Finally, the author develops his initial argument related to the link between the existence of anti-gay criminal legislation and what he refers to as "wider discrimination", i.e. harassment and violence against homosexuals and anti-gay prejudice. He argues that the existence of the law has adverse social and psychological impacts on himself and on others in his situation and cites numerous recent examples of harassment of and discrimination against homosexuals and lesbians in Tasmania. d/

7.9 Mr. Toonen explains that since lodging his complaint with the Committee, he has continued to be the subject of personal vilification and harassment. This occurred in the context of the debate on gay law reform in Tasmania and his role as a leading voluntary worker in the Tasmanian community welfare sector. He adds that more importantly, since filing his complaint, he lost his employment partly as a result of his communication before the Committee.

7.10 In this context, he explains that when he submitted the communication to the Committee, he had been employed for three years as General Manager of the Tasmanian AIDS Council (Inc.). His employment was terminated on 2 July 1993 following an external review of the Council's work which had been imposed by the Tasmanian government, through the Department of Community and Health Services. When the Council expressed reluctance to dismiss the author, the Department threatened to withdraw the Council's funding unless Mr. Toonen was given immediate notice. Mr. Toonen submits that the action of the Department was motivated by its concerns over his high profile complaint to the Committee and his gay activism in general. He notes that his complaint has become a source of embarrassment to the Tasmanian government, and emphasizes that at no time had there been any question of his work performance being unsatisfactory.

7.11 The author concludes that sections 122 and 123 continue to have an adverse impact on his private and his public life by creating the conditions for discrimination, continuous harassment and personal disadvantage.

Examination of the merits

8.1 The Committee is called upon to determine whether Mr. Toonen has been the victim of an unlawful or arbitrary interference with his privacy, contrary to article 17, paragraph 1, and whether he has been discriminated against in his right to equal protection of the law, contrary to article 26.

8.2 In so far as article 17 is concerned, it is undisputed that adult consensual sexual activity in private is covered by the concept of "privacy", and that Mr. Toonen is actually and currently affected by the continued existence of the Tasmanian laws. The Committee considers that sections 122 (a) and (c) and 123 of the Tasmanian Criminal Code "interfere" with the author's privacy, even if these provisions have not been enforced for a decade. In this context, it notes that the policy of the Department of Public Prosecutions not to initiate criminal proceedings in respect of private homosexual conduct does not amount to a guarantee that no actions will be brought against homosexuals in the future, particularly in the light of undisputed statements of the Director of Public Prosecutions of Tasmania in 1988 and those of members of the Tasmanian Parliament. The continued existence of the challenged provisions therefore continuously and directly "interferes" with the author's privacy.

8.3 The prohibition against private homosexual behaviour is provided for by law, namely, sections 122 and 123 of the Tasmanian Criminal Code. As to whether it may be deemed arbitrary, the Committee recalls that pursuant to its general comment 16 (32) on article 17, the "introduction of the concept of arbitrariness is intended to guarantee that even interference provided for by the law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the circumstances". a/ The Committee interprets the requirement of reasonableness to imply that any interference with privacy must be proportional to the end sought and be necessary in the circumstances of any given case.

8.4 While the State party acknowledges that the impugned provisions constitute an arbitrary interference with Mr. Toonen's privacy, the Tasmanian authorities submit that the challenged laws are justified on public health and moral grounds, as they are intended in part to prevent the spread of HIV/AIDS in Tasmania, and because, in the absence of specific limitation clauses in article 17, moral issues must be deemed a matter for domestic decision.

8.5 As far as the public health argument of the Tasmanian authorities is concerned, the Committee notes that the criminalization of homosexual practices cannot be considered a reasonable means or proportionate measure to achieve the aim of preventing the spread of AIDS/HIV. The Government of Australia observes that statutes criminalizing homosexual activity tend to impede public health programmes "by driving underground many of the people at the risk of infection". Criminalization of homosexual activity thus would appear to run counter to the implementation of effective education programmes in respect of the HIV/AIDS prevention. Secondly, the Committee notes that no link has been shown between the continued criminalization of homosexual activity and the effective control of the spread of the HIV/AIDS virus.

8.6 The Committee cannot accept either that for the purposes of article 17 of the Covenant, moral issues are exclusively a matter of domestic concern, as this would open the door to withdrawing from the Committee's scrutiny a potentially large number of statutes interfering with privacy. It further notes that with the exception of Tasmania, all laws criminalizing homosexuality have been repealed throughout Australia and that, even in Tasmania, it is apparent that there is no consensus as to whether sections 122 and 123 should not also be repealed. Considering further that these provisions are not currently enforced, which implies that they are not deemed essential to the protection of morals in Tasmania, the Committee concludes that the provisions do not meet the "reasonableness" test in the circumstances of the case, and that they arbitrarily interfere with Mr. Toonen's right under article 17, paragraph 1.

8.7 The State party has sought the Committee's guidance as to whether sexual orientation may be considered an "other status" for the purposes of article 26. The same issue could arise under article 2, paragraph 1, of the Covenant. The Committee confines itself to noting, however, that in its view, the reference to "sex" in articles 2, paragraph 1, and 26 is to be taken as including sexual orientation.

9. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it reveal a violation of articles 17, paragraph 1, _juncto_ 2, paragraph 1, of the Covenant.

10. Under article 2, paragraph 3 (a), of the Covenant, the author, as a victim of a violation of articles 17, paragraph 1, _juncto_ 2, paragraph 1, of the Covenant, is entitled to a remedy. In the opinion of the Committee, an effective remedy would be the repeal of sections 122 (a) and (c) and 123 of the Tasmanian Criminal Code.

11. Since the Committee has found a violation of Mr. Toonen's rights under articles 17, paragraph 1, and 2, paragraph 1, of the Covenant requiring the repeal of the offending law, the Committee does not consider it necessary to consider whether there has also been a violation of article 26 of the Covenant.

12. The Committee would wish to receive, within 90 days of the date of the transmittal of its views, information from the State party on the measures taken to give effect to the views.

[Done in English, French and Spanish, the English text being the original version.]

Notes

_a_/ _Official Records of the General Assembly, Forty-third Session, Supplement No. 40_ (A/43/40), annex VI, general comment 16 (32), para. 4.

_b_/ _Dudgeon v. the United Kingdom of Great Britain and Northern Ireland_, judgment of 22 October 1981, paras. 64-70; _Norris v. Ireland_, judgment of 26 October 1988, paras. 39-47; _Modinos v. Cyprus_, judgment of 22 April 1993, paras. 20-25.

_c_/ The author refers to the Committee's views in case No. 208/1986 (_Bhinder v. Canada_), adopted on 9 November 1989, paras. 6.1 and 6.2 (see _Official Records of the General Assembly, Forty-fifth Session, Supplement No. 40_ (A/45/40), annex IX.E).

_d_/ These examples are documented and kept in the case file.

Appendix

Individual opinion submitted by Mr. Bertil Wennergren under rule 94, paragraph 3, of the rules of procedure of the Human Rights Committee, concerning the Committee's views on communication No. 488/1992 (Nicholas Toonen v. Australia)

I do not share the Committee's view in paragraph 11 that it is unnecessary to consider whether there has also been a violation of article 26 of the Covenant, as the Committee concluded that there had been a violation of Mr. Toonen's rights under articles 17, paragraph 1, and 2, paragraph 1, of the Covenant. In my opinion, a finding of a violation of article 17, paragraph 1, should rather be deduced from a finding of violation of article 26. My reasoning is the following.

Section 122 of the Tasmanian Criminal Code outlaws sexual intercourse between men and between women. While section 123 also outlaws indecent sexual contacts between consenting men in open or in private, it does not outlaw similar contacts between consenting women. In paragraph 8.7, the Committee found that in its view, the reference to the term "sex" in article 2, paragraph 1, and in article 26 is to be taken as including sexual orientation. I concur with this view, as the common denominator for the grounds "race, colour and sex" are biological or genetic factors. This being so, the criminalization of certain behaviour operating under sections 122 (a) and (c) and 123 of the Tasmanian Criminal Code must be considered incompatible with article 26 of the Covenant.

Firstly, these provisions of the Tasmanian Criminal Code prohibit sexual intercourse between men and between women, thereby making a distinction between heterosexuals and homosexuals. Secondly, they criminalize other sexual contacts between consenting men without at the same time criminalizing such contacts between women. These provisions therefore set aside the principle of equality before the law. It should be emphasized that it is the criminalization as such that constitutes discrimination of which individuals may claim to be victims, and thus violates article 26, notwithstanding the fact that the law has not been enforced over a considerable period of time. The designated behaviour none the less remains a criminal offence.

Unlike the majority of the articles in the Covenant, article 17 does not establish any true right or freedom. There is no right to freedom or liberty of privacy, comparable to the right of liberty of the person, although article 18 guarantees a right to freedom of thought, conscience and religion as well as a right to manifest one's religion or belief in private. Article 17, paragraph 1, merely mandates that no one shall be subjected to arbitrary or unlawful interference with his privacy, family, etc. Furthermore, the provision does not, as do other articles of the Covenant, specify on what grounds a State party may interfere by way of legislation.

A State party is therefore in principle free to interfere by law with the privacy of individuals on any discretionary grounds, not just on grounds related to public safety, order, health, morals, or the fundamental rights and freedoms of others, as spelled out in other provisions of the Covenant. However, under article 5, paragraph 1, nothing in the Covenant may be interpreted as implying for a State a right to perform any act aimed at the limitation of any of the rights and freedoms recognized therein to a greater extent than is provided for in the Covenant.

The discriminatory criminal legislation at issue here is not strictly speaking "unlawful", but it is incompatible with the Covenant, as it limits the right to equality before the law. In my view, the criminalization operating under sections 122 and 123 of the Tasmanian Criminal Code interferes with privacy to an unjustifiable extent and, therefore, also constitutes a violation of article 17, paragraph 1.

A similar conclusion cannot, in my opinion, be reached on article 2, paragraph 1, of the Covenant, as article 17, paragraph 1 protects merely against arbitrary and unlawful interferences. It is not possible to find legislation unlawful merely by reference to article 2, paragraph 1, unless one were to reason in a circuitous way. What makes the interference in this case "unlawful" follows from articles 5, paragraph 1, and 26, and not from article 2, paragraph 1. I therefore conclude that the challenged provisions of the Tasmanian Criminal Code and their impact on the author's situation are in violation of article 26, in conjunction with articles 17, paragraph 1, and 5, paragraph 1, of the Covenant.

I share the Committee's opinion that an effective remedy would be the repeal of sections 122 (a) and (c) and 123, of the Tasmanian Criminal Code.

FF. Communication No. 492/1992, Lauri Peltonen v. Finland (views adopted on 21 July 1994, fifty-first session)[*]

Submitted by:	Lauri Peltonen (represented by counsel)
Victim:	The author
State party:	Finland
Date of communication:	23 December 1991 (initial submission)
Date of decision on admissibility:	16 October 1992

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 21 July 1994,

Having concluded its consideration of communication No. 492/1992, submitted to the Human Rights Committee by Mr. Lauri Peltonen under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, his counsel and the State party,

Adopts its views under article 5, paragraph 4, of the Optional Protocol.

1. The author of the communication is Lauri Peltonen, a Finnish citizen born in 1968, residing in Stockholm, Sweden, since 1986. He claims to be a victim of a violation by Finland of article 12 of the International Covenant on Civil and Political Rights. He is represented by counsel.

The facts as submitted by the author

2.1 In June 1990, the author applied for a passport at the Finnish Embassy in Stockholm. The Embassy refused to issue a passport, on the ground that Mr. Peltonen had failed to report for his military service in Finland on a specified date. Under section 9, subsection 1 (6), of the Passport Act of 1986, delivery of a passport "may be denied" to persons aged 17 to 30 if they are unable to demonstrate that the performance of military service is not an obstacle to the issuance of a passport.

2.2 The author appealed against the Embassy's decision to the Uusimaa Provincial Administrative Court, invoking his right to leave any country. By decision of 22 January 1991, the Court upheld the Embassy's decision. The author then appealed to the Supreme Administrative Court, which confirmed the previous decisions on 19 September 1991. With this, it is submitted, available domestic remedies have been exhausted.

2.3 The author notes that the administrative and judicial instances seized of his case did not justify the denial of a passport. In its decision, the Supreme Administrative Court merely observed that the Embassy had the right, under Section 9, subsection 1(6), not to issue a passport to the author because he was a conscript and had failed to prove that military service was no obstacle for obtaining a passport. In this context, it is noted that the Government of Finland stated during the examination of its third periodic report under article 40 of the Covenant in October 1990 that:

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[*] The text of an individual opinion submitted by Mr. Bertil Wennergren is appended.

> "... there might have been some misunderstanding concerning the question of obligation of military service. A passport could be issued to a person under duty of performing his military service and conscription, but its validity must temporarily expire during the period of military service. There is no de facto possibility for a conscript to leave the country during his military service and accordingly there will be no derogation from article 12 by withholding a valid passport during that period, which is only ... 8 to 11 months." a/

2.4 The author contends that the interpretation by the Supreme Court of the words "may be denied" in section 9, subsection 1 (6), means that Finnish Embassies around the world have full discretion to deny passports to Finnish citizens until they reach the age of 30. The duration of the denial of a passport is likely to exceed by far the period of "8 to 11 months", as it did in this case. The author acknowledges that failure to report for military service is an offence under the Finnish Military Service Act. He observes, however, that the authorities could have instituted criminal or disciplinary proceedings against him; failure to do so is said to further underline that the denial of a passport was and continues to be used as a de facto punishment.

The complaint

3. It is submitted that the denial of a passport pursuant to section 9, subsection 1 (6), of the Passport Act is (a) a disproportionate punishment in relation to the offence of failure to report for military service, (b) a violation of the author's right, under article 12 of the Covenant, to leave any country, and (c) a punishment not prescribed by law.

The State party's information and observations

4. The State party concedes that domestic remedies have been exhausted, and that the claim is admissible *ratione materiae* and sufficiently substantiated. Accordingly, the State party raises no objections to the admissibility of the communication.

The Committee's decision on admissibility

5.1 During its forty-sixth session, the Committee considered the admissibility of the communication. It noted that the State party did not raise objections to the admissibility of the communication. It nevertheless *ex officio* examined the author's claims, and concluded that the admissibility criteria laid down in articles 2, 3 and 5, paragraph 2, of the Optional Protocol had been met.

5.2 On 16 October 1992, the Committee declared the communication admissible.

The State party's submission on the merits and the author's comments thereon

6.1 In its submission under article 4, paragraph 2, of the Optional Protocol, the State party explains the operation of the relevant Finnish law. It notes that section 7, paragraph 1, of the Constitution Act (94/1919) provides for the right of a Finnish citizen to leave his/her own country; this is further spelled out in the Passport Act (642/1986) and Passport Decree (643/86), which regulate the right to travel abroad. Furthermore, section 75, paragraph 1, of the Constitution Act regulates the obligation of Finnish citizens to participate in the defense of the country; this is spelled out in the Military Service Act (452/50) and the Non-Military Service Act (1723/91). In relation to the legal obligation of military service, both Acts contain certain restrictions on a conscript's freedom of movement. The State party adds that the Nordic States have agreed that their citizens do not need a passport to travel within the area of the Nordic States and that passport inspections on their borders have been abolished.

6.2 Section 3, paragraph 1, of the Passport Act provides that a Finnish citizen shall obtain a passport, unless otherwise stipulated in the Act. As stated above (see para. 2.1), a passport may be denied to persons aged 17 to 30 if they are unable to demonstrate that the performance of military service is not an obstacle to the issuance of a passport (sect. 9, subsect. 1 (6)). In such cases, a request for a passport should be accompanied, with a police clearance certificate, a military passport, a call-up certificate, an order to enter into military service, a call-up certificate exempting the applicant from active military service during peace-time, a call-up certificate entirely exempting him from active military service or a certificate of non-military service (section 4 of the Passport Decree). A Finnish citizen living abroad and falling into the category of section 9 (1) (6) must obtain a statement from the police of his last place of residence in Finland, showing that he is not liable for military service.

6.3 As to the authorities' discretion to deny a person a passport or not, the State party points out that when considering a passport application from a person falling within the category of section 9(1), consideration must be given to "the significance of travel related to the applicant's family relations, state of health, subsistence, profession and other circumstances", in accordance with section 10 of the Act. b/ In this context, the State party refers to the ratio legis of the Passport Act as explained in Parliament, where it was noted that the decision to grant a passport is taken by legal discretion, based on acceptable objective grounds. Furthermore, according to a circular of the Legal Office of the Ministry for Foreign Affairs of 22 June 1992 (No. OIK-4, 1988/1594/68.40), an Embassy must consider its decisions in Section 9(1) cases on the basis of the statement obtained from the police of the applicant's last residence in Finland, and must take into account the circumstances of the case and the grounds referred to in section 10. Thus, the Embassy's discretion to grant a passport is not unlimited, since the Passport Act contains clearly specified grounds for rejecting a request for a passport.

6.4 As regards the time dimension, it is submitted that the application of section 9(1)(6) of the Passport Act cannot be limited solely to the period of a person's actual military service, but that it necessarily covers a more extensive period before and after such service, in order to secure that a conscript really performs his military service. The State party explains that for a person who has participated in his call-up for military or alternative service, and who has been granted a deferral, e.g. for up to three years, of performance of such service a passport is generally granted up to 28 years of age. Once the person liable for military service has reached the age of 28, the passport is generally granted for a shorter period of time, so that by the age of 30, he must perform his military service. Generally, citizens are not called for military service after the age of 30.

6.5 The State party notes that Mr. Peltonen did not react to his military call-up in 1987, and that he has disregarded all subsequent call-ups. Pursuant to section 42 of the Military Service Act, a person liable for military service who commits the offence referred to in section 40 of the Act (non-appearance in a military call-up) and who, after investigation, is deemed fit for service, can immediately be called to service, unless he has reached the age of 30 years. Thus, if the author arrives in Finland, he may be subjected to a preliminary enquiry as a result of his non-appearance in the military call-up, be disciplined for the offence and immediately called to service. The State party points out that the author, by arguing before the courts that he is not under an obligation to carry out the military duties imposed by the State, referred to one of the basic purposes of the provision of section 9(1)(6) of the Passport Act, namely, to make sure that those who have not fulfilled their civic obligation of military or alternative service will do so and not avoid it by any other means. The State party further notes that the author did not show that his liability for military service did not constitute a bar to the issuing of a passport, and that there were no changes in his situation that would have warranted another conclusion. Furthermore, no mention was made in his request of any of the grounds referred to in section 10. In this context, the State party emphasizes that the author does not require a passport, for example, for professional reasons, and that he merely needed one for holiday travel.

6.6 The State party dismisses as groundless the claim that the denial of a passport is used as a de facto punishment for the author's failure to report for military service. It submits that the denial of the passport is based on considerations which are specified in the Constitution Act, Passport Act and Passport Decree, and which are related to the Military Service Act. The denial of a passport neither constitutes a punishment nor in any other way replaces the investigation of, and the corresponding punishment for, the offence of failing to report for military service. If the author returns to Finland and is arrested, his failure to attend the call-ups will be investigated and sanctioned. However, the offence cannot serve as a basis for an extradition request.

6.7 The State party notes that, pursuant to article 12, paragraph 3, of the Covenant, the right to leave any country may be subject to restrictions which are provided for by law, are necessary to protect national security and public order (ordre public), and are consistent with the other rights recognized in the Covenant. For the State party, it is clear from the above that the Passport Act, which was passed by Parliament, is based on the Constitution Act and is linked to the Military Service Act, fulfils the requirement of "provided by law". The State party further submits that the competent authorities and tribunals have affirmed that the provisions of the Passport Act are an adequate legal basis in the author's case, and that their assessment of the case is neither arbitrary nor unreasonable.

6.8 As regards the legitimate aim of the restriction, the State party asserts that the denial of a passport falls under the notion of "public order (ordre public)", within the meaning of article 12, paragraph 3; the denial of a passport to a conscript has additional, even if indirect, links to the notion of "national security". It argues that the authorities' decision to reject the author's application for a passport was necessary for the protection of public order, and constituted an interference by the public authorities with the author's right to leave the country under the relevant provisions of the Passport Act, which was, however, justified. It concludes that the denial of a passport in the case was also proportional in relation to the author's right to leave any country, and that the restriction is consistent with the other rights recognized by the Covenant.

7.1 Counsel, in his comments, challenges the State party's contention that when applying the Passport Act, the authorities follow precise legal rules that circumscribe their discretion. In this context, he notes that, during consideration of the third periodic report of Finland by the Committee, several Committee members expressed concern about the restrictions on the issuance of passports under the Passport Act and Decree. c/ Moreover, after the examination of the report, the Ministry for Foreign Affairs recommended to the Ministry of the Interior that the Passport Act be amended. Counsel further notes that the circular mentioned in the State party's submission (para. 6.3) is dated 22 June 1992, that is, after Mr. Peltonen's case was decided by the administrative and judicial authorities and after he had submitted the case to the Committee.

7.2 Counsel submits that article 12 of the Covenant does not make any distinction between travel for professional reasons and travel for holiday purposes; he argues that the right to freedom of movement does not allow States parties to draw such artificial distinctions.

7.3 The author does not challenge the State party's position that a State must have some means at its disposal to secure that conscripts actually perform their military service; he submits that what is at issue in the case is not whether the State party is allowed to take "some measures", but whether the measures taken in the case are acceptable in light of the provisions of the Covenant. If the State party wishes to take "some measures" to secure the performance of military service, it must take legislative action, for example, by amending the Criminal Code. It is submitted that if the State does not take such measures, it cannot use the Passport Act as a legal basis for a de facto punishment lasting for more than 10 years.

Examination of the merits

8.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

8.2 As to the question of whether the State party's refusal to issue a passport to Mr. Peltonen, pursuant to section 9, subsection 1(6), of the Finnish Passport Act, violates his right, under article 12, paragraph 2, of the Covenant, to leave any country, the Committee observes that a passport is a means of enabling an individual "to leave any country, including his own" as required by article 12, paragraph 2. The Committee further observes that, pursuant to article 12, paragraph 3, the right to leave any country may be subject to such restrictions as are "provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the ... Covenant". There are, therefore, circumstances in which a State, if its law so provides, may refuse a passport to one of its citizens.

8.3 The *travaux préparatoires* to article 12, paragraph 3, of the Covenant reveal that it was agreed upon that the right to leave the country could not be claimed, *inter alia*, in order to avoid such obligations as national service. d/ Thus, States parties to the Covenant, whose laws institute a system of mandatory national service may impose reasonable restrictions on the rights of individuals who have not yet performed such service to leave the country until service is completed, provided that all the conditions laid down in article 12, paragraph 3, are complied with.

8.4 In the present case, the Committee notes that the refusal by the Finnish authorities to issue a passport to the author, indirectly affects the author's right under article 12, paragraph 2, to leave any country, since he cannot leave his country of residence, Sweden, except to enter countries that do not require a valid passport. The Committee further notes that the Finnish authorities, when denying the author a passport, acted in accordance with section 9, subsection 1(6), of the Passport Act, and that the restrictions on the author's right were thus provided by law. The Committee observes that restrictions of the freedom of movement of individuals who have not yet performed their military service are, in principle, to be considered necessary for the protection of national security and public order. The Committee notes that the author has stated that he needs his passport for holiday travelling and that he has not claimed that the authorities' decision not to provide him with a passport was discriminatory or that it infringed any of his other rights under the Covenant. In the circumstances of the present case, therefore, the Committee finds that the restrictions placed upon the author's right to leave any country are in accordance with article 12, paragraph 3, of the Covenant.

9. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it do not reveal a violation by the State party of any of the provisions of the Covenant.

[Adopted in English, French and Spanish, the English text being the original version.]

Notes

a/ CCPR/C/SR.1016, para. 21.

b/ Section 10 is entitled "Considering the restrictions and obstacles for the granting of a passport".

c/ CCPR/C/SR.1016, see in particular paragraphs 19 and 35-40.

d/ See E/CN.4/SR.106, p. 4; E/CN.4/SR.150, para. 41; E/CN.4/SR.151, para. 4 and E/CN.4/SR.315, p. 12.

Appendix

Individual opinion submitted by Mr. Bertil Wennergren pursuant to rule 94, paragraph 3, of the rules of procedure of the Committee on Human Rights, concerning the Committee's views on communication No. 492/1992

(Lauri Peltonen v. Finland)

Under article 12, paragraph 2, of the Covenant, everyone shall be free to leave any country, including his own. This right shall not, according to paragraph 3 of this article, be subject to any restrictions, except those which are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the Covenant. The *travaux préparatoires* to article 12 reveal that it was agreed that the right to leave one's country could not be claimed in order to escape legal proceedings or to avoid such obligations as national service, the payment of fines, taxes or maintenance allowances. A proposed text that "anyone who is not subject to any lawful deprivation of liberty or to any outstanding obligations with regard to national service shall be free to leave any country including his own" was rejected earlier. The limitations agreed upon are covered by the text of paragraph 3. According to section 9 of the Finnish Passport Act (Law No. 642/86), which entered into force on 1 October 1987, a passport may be denied to a person, *inter alia*, if he is liable to perform military service and is at least 17 but not yet 30 years of age, unless he shows that his liability to perform military service does not constitute an obstacle to the issue of a passport.

The Nordic States have agreed that their citizens do not require a passport to travel within the territory of the Nordic States. The author therefore could leave Finland in 1986 and take residence in Sweden without a passport. He has been residing in Sweden ever since and has disregarded all call-ups for military service by the Finnish authorities. It is therefore unsurprising that the Supreme Administrative Court of Finland rejected his appeal against the Finnish Embassy's decision to refuse to provide him with a passport. As the Court observed, he was a conscript and had failed to prove that military service was no obstacle for him to obtain a passport.

What is at issue now is not the author's right to leave Finland. Thanks to the agreement among the Nordic States, he has been able to do so without a passport. What is at issue is his right to leave "any country", which, because of the aforementioned agreement, means "any of the other Nordic countries", as he can move freely from one of them to the other. Without a passport he cannot leave any Nordic State to travel to non-Nordic countries. To me, it is difficult to see that article 12, paragraph 3, entitles the State party to deny the author a passport on any of the grounds mentioned in this paragraph. None of them justifies the State party's prohibition on Mr. Peltonen to leave any country other than Finland. Article 12, paragraph 2, of the Covenant, in my view, obliges the State party to respect the author's freedom of leaving any country other than Finland by issuing a passport to him.

It would not be justified to interpret paragraph 3 of article 12 as entitling a State party to deny a passport to a person if a passport would enable him to leave a country other than Finland because he avoids military service in Finland. Such an interpretation would allow the State party to use and abuse the refusal of a passport as a means of exerting pressure on a conscript, so as induce him to return to Finland and perform his military service and be disciplined for his non-appearance in the military call-ups.

It is not necessary either for the protection of national security, public order or public morals to use the refusal of a passport for restrictions on a person's freedom to leave any country for such purposes. This would be entirely incompatible with the object and purpose of paragraph 3. I therefore am of the opinion that the State party has violated article 12, paragraph 2, by refusing a passport to the author, which is a prerequisite for the exercise of his freedom to leave any country.

[Done in English, French and Spanish, the English text being the original version.]

ANNEX X

Decisions of the Human Rights Committee declaring communications inadmissible under the Optional Protocol to the International Covenant on Civil and Political Rights*

A. Communication No. 384/1989, R. M. v. Trinidad and Tobago (decision adopted on 29 October 1993, forty-ninth session)

Submitted by:	R. M. [name deleted]
Alleged victim:	The author
State party:	Trinidad and Tobago
Date of communication:	16 July 1989 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 29 October 1993,

Adopts the following:

Decision on admissibility

1. The author of the communication is R. M., a Trinidadian citizen currently awaiting execution at the State Prison in Port-of-Spain, Trinidad and Tobago. He claims to be a victim of violations of the International Covenant on Civil and Political Rights by Trinidad and Tobago.

The facts as submitted by the author

2.1 The author was arrested in early September 1978 on suspicion of having killed, during the night of 6 to 7 September 1978, one H. H. On 11 September 1978, the Chaguanas Magistrates Court committed him and his co-defendant, a/ to stand trial for murder. On 6 November 1980, the author and his co-defendant were convicted of murder in the High Court in Port-of-Spain and sentenced to death. On 6 November 1983, the Court of Appeal of Trinidad quashed the convictions and ordered a re-trial. At its conclusion, on 29 June 1984, the High Court once again convicted both defendants of murder. Their further appeal was dismissed by the Court of Appeal on 9 July 1985, as was their petition for special leave to appeal to the Judicial Committee of the Privy Council (22 May 1986).

2.2 In July 1986, a constitutional motion to the High Court of Trinidad and Tobago was filed on the author's behalf. This motion remains pending, but it would appear that its determination has been adjourned *sine die*.

2.3 The author's conviction, like that of his co-defendant, was based essentially upon the evidence of the principal prosecution witness, L. S. She testified that in the morning of 6 September 1978, she had gone to the Couva

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* Made public by a decision of the Human Rights Committee.

Magistrates' Court to attend a hearing. As the hearing of the case was adjourned, she left the court with the author's co-defendant and another man and visited some places of entertainment, where they had some drinks. Later in the afternoon, they separated from the third man and drove to the author's house - the author then joined them. In the evening, they drove to a snack bar in San Juan, where the author and his co-defendant bought further drinks. Thereafter, all three drove to the house of H. H.

2.4 L.S. further testified that both men invited H. H. to join them in having some fun with her; she claimed that, although she became aware of the men's intentions, she was too scared to react. They then drove to a sugar cane field, where they tried to abuse her. L. S. maintained that the author's co-defendant hit the deceased in the neck or over the head with a cutlass. While the author was holding the deceased to prevent him from escaping, she heard the author's co-defendant fire three shots. No bullets or empty shells were recovered subsequently on the scene of the crime, when the police searched the field where H. H. had been killed.

2.5 L.S. further testified that afterwards, all three drove to the beach, where the author's co-defendant threw the murder weapon into the sea and hid a pair of trousers belonging to the deceased in nearby bushes. A search of the beach produced the trousers but not the cutlass. L. S. added that both accused threatened her with death if she were to report the incident to the police. Under cross-examination, she admitted that she only reported to the police after having been told by her father that the police were looking for her.

2.6 The author denies any involvement in the crime. He contends that he knew neither L. S. nor the author's co-defendant prior to his arrest, and asserts that he was at home during the night of the crime. He further contends that the evidence of two witnesses given during the trial would support his claim that he was in a restaurant when the murder was committed. During the trial, the arresting officer testified that the author had made an oral statement to him upon his arrest that could be understood as implicating the author in the death of H. H. b/ The author points out that when asked in court about a cautioned statement taken from the author at the police station, the officer was unable to produce the station diary in which such a statement should have been recorded.

The complaint

3.1 The author contends that L. S. was an accomplice or abettor, and that the judge failed to instruct the jury adequately on the trustworthiness and corroboration of her evidence. In this context, it is submitted that the issue of appropriate instructions was all the more important because of the apparent inconsistencies in the testimony of prosecution witnesses during the re-trial.

3.2 The author further contends that he had insufficient time to prepare his defence. Thus, he claims that prior to the first trial, he did not have the opportunity to discuss the case with his attorney, which his family had retained for him; during the trial, this lawyer's associate did not visit the author to discuss defence statements, although the author insists that he had been promised a visit. Similarly, prior to the re-trial, the attorney assigned to defend him only consulted with him for a limited amount of time on the day of the opening of the re-trial; he adds that this attorney never visited him in prison prior to the re-trial.

The State party's information and observations

4. The State party does not raise any objections to the admissibility of the communication. It concedes that the author has exhausted all criminal appeals. As to the author's constitutional motion filed in July 1986, it points out that since this motion merely seeks a declaration that should an order for the author's execution be made, he must be given five day's notice, and as this question has already been solved in the affirmative in another case, "this action is unnecessary". The State party adds that this motion is the only matter which remains pending in court, and that assurances have been given not to execute the author pending its determination. Finally, the State party notes that the author currently benefits from legal representation.

Issues and proceedings before the Committee

5.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

5.2 As to the author's claim of unfair trial because of the court's evaluation of the evidence, in particular the testimony of the main prosecution witness, and the alleged inadequacy of the judge's instructions to the jury, the Committee reaffirms that it is generally for the appellate courts of States parties to the Covenant to evaluate facts and evidence in a particular case. It is not, in principle, for the Committee to review specific instructions to the jury by the judge, unless it can be ascertained that the instructions were clearly arbitrary or amounted to a denial of justice, or that the trial judge manifestly violated his obligation of impartiality. After careful consideration of the material before it, the Committee cannot conclude that the conduct of the trial or the judge's instructions suffered from such defects. Accordingly, under article 3 of the Optional Protocol, this part of the communication is inadmissible as it is incompatible with the provisions of the Covenant.

5.3 As to the author's claim that he had insufficient time to prepare the defence for his first trial and re-trial, the Committee's concern is only with the re-trial, as the conviction in the first trial had been quashed. Concerning the re-trial, the author has failed to substantiate his claim that the time available for consultation with his attorney prior to it prevented counsel or himself from adequately conducting the defence. Furthermore, the material before the Committee does not reveal that an adjournment of the re-trial was requested because of insufficient time for the preparation of the defence. In the circumstances, the Committee concludes that the author has no claim under the Covenant, within the meaning of article 2 of the Optional Protocol.

6. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under articles 2 and 3 of the Optional Protocol;

(b) That this decision shall be communicated to the State party and to the author of the communication.

[Done in English, French and Spanish, the English text being the original version.]

Notes

a/ On 8 April 1993, the Human Rights Committee adopted its views on the co-defendant's communication, finding violations of articles 7 and 10, paragraph 1, of the Covenant (see *Official Records of the General Assembly, Forty-eighth Session, Supplement No. 40* (A/48/40), annex XII.Q).

b/ To the arresting officer, the author allegedly remarked that the deceased "cross my path, he got what was coming to him".

B. Communication No. 421/1990, Thierry Trébutien v. France (decision adopted on 18 July 1994, fifty-first session)

Submitted by:	Thierry Trébutien
Alleged victim:	The author
State party:	France
Date of communication:	27 June 1990 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 18 July 1994,

Adopts the following:

Decision on admissibility

1. The author of the communication is Thierry Trébutien, a French citizen born in 1960, currently detained in a French penitentiary. He claims to be a victim of violations by France of articles 9, paragraphs 1 to 3; 14, paragraphs 1 and 3 (a) and (b); and 23, paragraph 1, of the International Covenant on Civil and Political Rights. The author requests compensation pursuant to article 9, paragraph 5, of the Covenant.

The facts as submitted by the author

2.1 On 7 May 1982, the author was convicted on four counts of armed robbery in the city of Nantes and sentenced to eight years' imprisonment. He was incarcerated in the prison of Caen. After benefitting from a special leave in 1985, he failed to return to the prison. The author was rearrested in December 1986, after having committed a number of criminal offences, including armed robbery. On 28 February 1988, he managed to escape again, this time from the prison of Cherbourg, and allegedly committed another series of offences, mainly armed robberies (including bank robberies), together with two accomplices. In the course of a bank robbery committed on 22 March 1988 at Saint-Fargeau-Ponthierry (Seine et Marne), a bank cashier was seriously injured by a gunshot, which the author was alleged to have fired. Two other cases involved, on 25 March and 19 and 20 April 1988, the taking of a total of five hostages.

2.2 The author and his accomplices then fled to Portugal. On 22 June 1988, they were arrested in Porto. A warrant for the author's arrest was issued by the examining magistrate of the tribunal of Fontainebleau on 23 June 1988. On 28 June 1988, the Court of Appeal of Evora, Portugal, ordered his extradition; he was extradited to France on 11 July 1988.

2.3 Upon his arrival in France, the author and his accomplices were charged with armed robbery under aggravating circumstances, illegal arrest and detention of individuals, taking of hostages, fraud and theft by the examining magistrate of the tribunal of Fontainebleau, and placed under detention.

2.4 On 19 September 1989, the author was convicted on another charge of armed robbery by the Court of Assizes of the Manche region (Cour d'assises de la

Manche) and sentenced to 12 years' imprisonment. The Court of Cassation (Cour de cassation) in Paris dismissed the appeal related to this conviction on 17 January 1990. On 6 November 1989, the Court of Appeal of Caen (Normandy) sentenced the author to two years' imprisonment for the escape from prison on 28 February 1988. On 8 February 1990, the Court of Cassation dismissed the appeal filed against this sentence. On 11 July 1990, the Criminal Chamber of the Court of Appeal of Caen referred the author's case, on the charges brought in relation to the offences committed on 28 February 1988, to the Court of Assizes of the Manche region. An appeal against this decision was rejected by the Court of Cassation on 6 November 1990. This case against the author was heard in early March 1991 and led to a sentence of eight years' imprisonment, pronounced by the Court of Assizes of the Manche region on 15 March 1991. Appeal against conviction and sentence was dismissed by the Court of Cassation on 4 December 1991.

2.5 With regard to the preliminary investigation of the charges brought against Thierry Trébutien on 11 July, the examining magistrate suspended the permits for visits by the author's family on 3 November 1988; he reinstated them for the author's sister and mother on 7 March 1989, but not for his brothers or his female companion. The author is said to have been heard the last time by the examining magistrate of 7 April 1990 or when he appeared on 9 July 1990 before the presiding judge of the Fontainebleau court of major jurisdiction acting as examining magistrate, prior to the one-year extension of the author's pre-trial detention.

2.6 On 25 April 1990, the examining magistrate issued an order transmitting the papers relating to the case to the government procurator for a ruling. On 7 June 1990, the procurator requested further information. In addition, on dates which have not been specified, the examining magistrate issued several rogatory commissions. On 14 March 1991, the examining magistrate issued another order transmitting the papers relating to the case to the procurator, who handed down a definitive indictment on 29 January 1991. The examining magistrate closed the investigation by an order dated 14 March 1991; and by a decision dated 13 May 1991, the indictment division of the Court of Appeal of Paris referred to the Court of Assizes of Seine et Marne.

2.7 The author lodged an appeal against the referral decision, which was rejected by the Court of Cassation on 17 September 1991. Although the author received legal assistance, it appears that the barrister appointed by the court did not file a statement. Mr. Trébutien filed a statement on his own behalf. On 8 October 1991, the Court of Assizes of Seine et Marne sentenced the author to 8 years' imprisonment for the crimes committed on 25 March and 19 and 20 April 1988.

2.8 Throughout his pre-trial detention, Mr. Trébutien filed several applications for release. One was rejected by the examining magistrate on 14 August 1990, which decision was confirmed by the indictment division on 30 August 1990. Under a judgement dated 18 December 1990, the Court of Cassation reversed that ruling on the grounds that the division had not responded to all the applications filed by the author and referred the case to the same indictment division composed of different members, which, under an order dated 7 May 1991, confirmed the rejection of the application for release. The Court of Cassation dismissed the appeal. In an order dated 21 and 24 August 1990, the examining magistrate rejected two other applications for release filed by the author. On appeal, the indictment division of the Court of Appeal of Paris confirmed those rejection orders on 12 September 1990.

2.9 In a judgement dated 4 January 1991, the Court of Cassation reversed that ruling and referred the case to the same indictment division composed of different members. On 28 February 1991, the division confirmed the orders rejecting the applications for release, referring in particular to the renewed danger of escape, the author's lengthy judicial record and the gravity of the punishment incurred. The author filed a further appeal, and the Court of Cassation, in a judgment dated 11 June 1991, reversed the ruling on the grounds of a violation of the rights of the defence and referred the case to the indictment division of the Court of Appeal of Versailles. On 5 November 1991, that division ordered the author's release on the grounds that he had already served, for other acts, a definitive term of imprisonment. The author filed a further appeal for judicial review, referring to the length of time taken by the judicial authorities to rule on his applications. The Court of Cassation declared that appeal inadmissible in a judgement dated 2 March 1992 by reason of the fact that the decision in question did not constitute grounds for a complaint on his part.

2.10 Another application for release was rejected by the examining magistrate on 28 December 1990. On 17 January 1991, the indictment division confirmed the rejection, emphasizing in particular the danger that the author might escape. The Court of Cassation dismissed the appeal on 23 April 1991. A further application for release was submitted directly to the indictment division of the Court of Appeal of Paris, which, on 24 July 1991, ordered his release on grounds that Mr. Trébutien had already served a sentence of a definitive term of imprisonment. The author lodged other applications for release subsequently, but the file does not provide further details.

2.11 The author points to irregularities said to have occurred in connection with the numerous judicial proceedings against him. In particular, he contends that the French judicial authorities did not seek to ascertain from him the circumstances of his extradition to France and his confinement at the prison of Fleury-Mérogis. He observes that under sections 132 and 133 of the French Code of Criminal Procedure (Code de procédure pénale), the Examining Magistrate was obliged to question him about these events within 24 hours. He thus concludes that he was held arbitrarily and that he should have been released, pursuant to sections 125 and 126 of the Code.

2.12 The author also points out that when he appeared before the Court on 19 September 1989, he had been in detention for one year, two months and eight days, a period during which he was not questioned and was not provided with a court-appointed legal representative. When counsel was finally appointed, the President of the Court allegedly withheld the necessary court documents for consultation and preparation of the defence. According to the author, because of this situation, the pleadings of counsel before the court lasted no more than a few minutes.

2.13 The author notes that between 1991 and 1993, he has been transferred from prison to prison, including to the prison of St. Maur. After a spectacular escape of some prisoners from the prison of St. Maur in June 1993, the prison authorities requested that the author be placed in isolation detention, because of "strong indications that he was preparing his own escape". The author claims that he had nothing to do with the escape of June 1993 and that he is now being arbitrarily transferred from one prison to another.

2.14 On 7 March 1990, the author filed a first complaint with the European Commission of Human Rights. It was based on an alleged violation of article 5, paragraph 1, of the European Convention for the Protection of Human Rights and

Fundamental Freedoms, registered as case No. 17215/90, and declared inadmissible on 5 December 1990 as manifestly ill-founded. On 11 October 1991, the author filed a second complaint with the European Commission. This complaint was registered before the Commission as case No. 19228/91. On 14 October 1992, the Commission declared the case inadmissible, invoking different grounds. Concerning irregularities in the extradition proceedings, it found the complaint inadmissible _ratione personae_ in the sense of article 27, paragraph 2, of the Convention. Concerning the denial of visits from family members in prison, it concluded that domestic remedies had not been exhausted. Finally, the complaints about inadequate legal representation, violations of the principle of equality of arms and undue prolongation of the judicial proceedings, were dismissed as "manifestly ill-founded" within the meaning of article 27, paragraph 2, of the European Convention. The author then introduced a third complaint with the Commission which was registered as case No. 21476/93 and declared inadmissible on 14 October 1993 on the ground that the facts were substantially the same as those that had been at the basis of the Commission's earlier decision of 14 October 1992.

The complaint

3.1 It is alleged that the facts as described above reveal violations of articles 9, paragraphs 1 to 3; 14, paragraphs 1 and 3(a) and (b); and 23, paragraph 1, of the Covenant.

3.2 In particular, Mr. Trébutien submits that his detention between 11 July 1988 and September 1989 was arbitrary, as the charges on which he was convicted on 19 September 1989 had not been notified to him and were not those on which he was extradited from Portugal or on which the Portuguese authorities had accepted his extradition. _a_/

3.3 The author complains in particular about irregularities committed in the proceedings leading to his conviction of 15 March 1991. In this context, he accuses several of the judges in the indictment chamber of the Court of Appeal of Caen and on the Court of Cassation, alleging that they forged judicial documents, including the decisions of 10 July and 6 November 1990 ("... se sont rendus coupables de faux en écriture publique, sur des actes judiciaires").

3.4 The author complains further that he was denied the right to receive visits in prison from members of his family, in violation of article 23, paragraph 1, of the Covenant.

3.5 Finally, the author complains that the judicial proceedings against him have been unduly prolonged.

The State party's information and observations and the author's comments thereon

4.1 In its submission under rule 91 of the rules of procedure, the State party contends that the communication is inadmissible, on the basis of articles 5, paragraph 2(a); 3; and 1 of the Optional Protocol.

4.2 The State party recalls that the author had submitted three complaints to the European Commission, all of which were declared inadmissible. In this context, the State party argues that the French reservation to article 5, paragraph 2(a), of the Protocol, which excludes the competence of the Committee if the same matter has already been examined by another instance of international investigation or settlement, applies to the present case. It is submitted that as the European Commission declared inadmissible the author's complaint based on alleged violations of article 5, paragraph 1, of the European Convention (case No. 17215/90), and the author's claims before the Committee relate primarily to article 9 of the Covenant, the Committee is seized of the "same matter" as was the European Commission. The State party does not specify, however, whether this argumentation extends to the other two complaints considered and dismissed by the European Commission of Human Rights.

4.3 The State party further contends that as the author complains about the alleged irregularity of the proceedings linked to his extradition from Portugal, his communication should be deemed inadmissible as incompatible with the provisions of the Covenant, pursuant to article 3 of the Optional Protocol, as extradition as such is outside the scope of application of the Covenant.

4.4 Subsidiarily, the State party contends that the author does not qualify as a victim within the meaning of article 1 of the Protocol. In this regard, it explains that if there were irregularities in the proceedings before the various French tribunals linked to a misinterpretation of the extradition order, these irregularities were corrected in February 1990, June 1990 and February 1991, respectively. As a result, it is submitted that since the latter date, the author has had no reason to complain about violations of his rights under the Covenant in the context of the extradition process.

4.5 Finally, the State party contends that as far as the author's complaint about the judgement of the Cour d'assises de la Manche of 19 September 1989 is concerned, available domestic remedies have not been exhausted, on the basis that the author failed to substantiate his grounds of appeal before the Court of Cassation.

5.1 In his comments, the author dismisses the State party's arguments and considers that his communication should be deemed admissible at least inasmuch as his claims under articles 9, paragraphs 3 and 4, and 14, paragraphs 1 and 3(a), are concerned.

5.2 In this context, the author submits that his complaints to the European Commission in fact differ significantly from those submitted to the Human Rights Committee. He notes that his third complaint to the European Commission (case No. 21476/93) concerned exclusively a request, filed with the Court of Appeal of Paris, that the prison terms imposed on him on 15 March and 8 October 1991 respectively, should run concurrently ("requête en confusion de peine"). The Court of Appeal had rejected this request on 30 June 1992, in Mr. Trébutien's opinion unjustifiably so. Mr. Trébutien notes that the terms of the European Commission's decision of 14 October 1993 refer specifically to the Commission's previous decision of 14 October 1992 on case No. 19228/91; he contends that this (second) case had only related to the proceedings leading to his conviction of 8 October 1991 by the Court of Assizes of Seine et Marne.

5.3 The author further explains that his initial complaint to the European Commission (case No. 17215/90) concerned his conviction for escape from prison by the Court of Appeal of Caen (6 November 1989) as well as his conviction of 19 September 1989 by the Cour d'assises de la Manche. In respect of both convictions, he had invoked violations of article 5 (1) of the European Convention, that is, the alleged arbitrariness of his detention on account of the non-observance of certain procedural requirements in the extradition proceedings. He contends that case No. 17215/90 in no way concerned his conviction to eight years' imprisonment pronounced by the Cour d'assises de la Manche on 15 March 1991 for his escape from prison, and that the alleged irregularities leading to this conviction are at the basis of his "supplementary" communications of 27 January 1992 to the Human Rights Committee.

5.4 The author concludes that if the Committee is seized of the same matter as the European Commission, it is only in respect of the alleged arbitrariness of his detention from July 1988 to September 1989, that is, only in respect of allegations that could be subsumed under article 9, paragraph 1, of the Covenant. He submits that his other claims under articles 9, paragraphs 3 and 4, and 14, paragraphs 1 and 3 (a), do not constitute the same matter, as they were not examined, as such, by the European Commission of Human Rights.

Issues and proceedings before the Committee

6.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The Committee has taken note of the State party's arguments related to article 5, paragraph 2 (a), of the Protocol, as well as of the author's comments thereon. It recalls that in respect of article 5, paragraph 2 (a), of the Optional Protocol, France entered the following reservation upon ratification:

> "... the Human Rights Committee shall not have competence to consider a communication from an individual if the same matter is being or has already been considered under another procedure of international investigation" ("... le Comité ... ne sera pas compétent pour examiner une communication émanant d'un particulier si la même question est en cours d'examen ou a déjà été examinée par une autre instance internationale d'enquête ou de règlement").

6.3 The author has argued that since the European Commission of Human Rights did not address all the complaints that have been placed before the Human Rights Committee, it did not consider the same matter within the meaning of article 5, paragraph 2 (a), of the Optional Protocol. The Committee considers that what constitutes the "same matter" within the meaning of article 5, paragraph 2 (a), of the Optional Protocol in the instant case must be understood as referring to the facts and events which were at the basis of the author's complaints to the European Commission of Human Rights.

6.4 Notwithstanding the fact that the author's case was declared inadmissible in respect of all of his claims, albeit on different grounds, under the European Convention for the Protection of Human Rights and Fundamental Freedoms, the case was none the less examined by the European Commission. The Committee has ascertained that the author's complaint before that body is based on the same events and facts as the communication that has been submitted under the Optional Protocol to the Covenant; accordingly, the Committee is seized of the "same matter" as the European Commission of Human Rights, and, in the light of the French reservation to article 5, paragraph 2 (a), of the Optional Protocol, is precluded from considering the author's communication.

7. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under article 5, paragraph 2 (a), of the Optional Protocol;

(b) That this decision shall be communicated to the State party and the author of the communication.

[Adopted in English, French and Spanish, the English text being the original version.]

Notes

a/ This situation is explained in a decision of the First Criminal Chamber of the Court of Appeal of Paris of 29 May 1991, in which it is stated that the indictments against Mr. Trébutien and his accomplices could not be notified to them via the normal channels as they were then fugitives. A letter from the Ministry of Justice of 22 July 1991 addressed to the author explains that the author's detention from 11 July 1988 to 19 September 1989 can in no way be deemed arbitrary, given the existence of the international arrest warrant (*mandat d'arrêt international*) issued on 23 June 1988.

C. *Communication No. 431/1990, O. Sara et al v. Finland* (*decision adopted on 23 March 1994, fiftieth session*)

Submitted by: O. Sara *et al* (represented by counsel)

Alleged victims: The authors

State party: Finland

Date of communication: 18 December 1990

Date of decision on admissibility: 9 July 1991

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 23 March 1994,

Setting aside, pursuant to rule 93, paragraph 4, of its rules of procedure, an earlier decision on admissibility dated 9 July 1991,

Adopts the following:

Revised decision on admissibility

1. The authors of the communication dated 18 December 1990 are Messrs. O. Sara, J. Näkkäläjärvi and O. Hirvasvuopio and Ms. A. Aårelå, all Finnish citizens. They claim to be the victims of a violation by Finland of article 27 of the International Covenant on Civil and Political Rights. They are represented by counsel.

The facts as submitted by the authors

2.1 The authors are reindeer breeders of Sami ethnic origin. Together with the Herdsmen's committees (cooperative bodies set up to regulate reindeer husbandry in Finland), they represent a substantial part of reindeer herding in Finnish Lapland. Mr. Sara is the chief and Mr. Näkkäläjärvi, the deputy chief of the Sallivaara Herdsmen Committee; Mr. Hirvasvuopio is the chief of the Lappi Herdsmen Committee. In terms of counted reindeer the Sallivaara Herdsmen Committee is the second largest herdsmen's committee in Finland; the Lappi Herdsmen's Committee is the third largest.

2.2 On 16 November 1990, the Finnish Parliament passed bill 42/1990, called the Wilderness Act (*erämaalaki*), which entered into force on 1 February 1991. The legal history of this bill is the result of a delicate compromise reached after protracted discussions between the Samis, environmental protection lobbyists and the Finnish Forest Administration about the extent of logging activities in northernmost Finland, that is, close to or north of the Arctic Circle. Under the provisions of the Act, specifically designated areas are off limits for logging, whereas in others, defined as "environmental forestry areas" (*luonnonmukainen metsänhoito*), logging is permitted. Another, third, category of forest areas remains unaffected by the application of the Act.

2.3 An important consideration in the enactment of the Act, reflected in section 1, is the protection of the Sami culture and particularly of traditional Sami economic activities. Section 3, however, reveals that the *ratio legis* of the Act is the notion and extension of State ownership to the wilderness areas of Finnish Lapland. The authors note that the notion of State ownership of these areas has long been fought by Samis. The implication of section 3, in particular, is that all future logging activities in the areas used by them for reindeer husbandry will be matters controlled by different Government authorities. In particular, section 7 of the Act entrusts a Central Forestry Board (metsähallitus) with the task of planning both use and maintenance (hoito-ja käyttösuunnitelma) of the wilderness area. While the Ministry for the Environment (ympäristöministeriö) may either approve or disapprove the plans proposed by this Board, it cannot amend them.

2.4 The authors indicate that the area used for herding their reindeers during the winter months is a hitherto unspoiled wilderness area. The border between the municipalities of Sodankylä and Inari nowadays divides this wilderness into two separate herdsmen's committees. Under the Wilderness Act, the largest part of the authors' reindeer breeding area overlaps with the Hammastunturi Wilderness area; other parts do not and may therefore be managed by the Central Forestry Board. Under preliminary plans approved by the Board, only small portions of the authors' breeding area would be off-limits for logging operations, whereas the major part of their areas overlapping with the Hammastunturi Wilderness would be subject to so-called "environmental forestry", a concept without a precise definition. Furthermore, on the basis of separate decisions by Parliament, the cutting of forests within the Hammastunturi Wilderness would not begin until the approval by the Ministry for the Environment, of a plan for use and maintenance. The Act, however, is said to give the Central Forestry Board the power to start full-scale logging.

2.5 At the time of submission in 1990, the authors contended that large-scale logging activities, as authorized under the Wilderness Act, were imminent in the areas used by them for reindeer breeding. Thus, two road construction projects were started in the authors' herding areas without prior consultation with the authors, and the roads are said to serve no purpose in the maintenance of the authors' traditional way of life. The authors claimed that the roads were intended to facilitate logging activities inside the Hammastunturi Wilderness in 1992 and, in all likelihood, outside the Wilderness as early as the summer of 1991. The road construction had already penetrated a distance of over 6 miles, at a breadth of 60 feet, into the reindeer herding areas used by the authors. Concrete sink rings have been brought on site, which the authors claim underline that the road is to be built for all-season use by heavy trucks.

2.6 The authors reiterate that for the Lappi Herdsmen's Committee, the area in question is an important breeding area, and that they have no use for any roads within the area. For the Lappi Herdsmen's Committee, the area is the last remaining natural wilderness area; for the Sallivaara Herdsmen's Committee, the area forms one third of its best winter herding areas and is essential for the survival of reindeers in extreme climatic conditions. As to the disposal of slaughtered reindeers, the authors note that slaughtering takes place at places specifically designed for that purpose, located close to main roads running outside the herding area. The Sallivaara Herdsmen's Committee already possesses a modern slaughterhouse, and the Lappi Herdsmen's Committee has plans for a similar one.

2.7 The authors further note that the area used by them for winter herding is geographically a typical watershed highland, located between the Arctic Sea and the Baltic. These lands are surrounded by open marshlands covering at least two thirds of the total area. As in other watershed areas, abundant snow and rainfalls are common. The winter season is approximately one month longer than in other areas. The climate has a direct impact on the area's environment, in particular the trees (birch and spruce), whose growth is slow; the trees in turn encourage the growth of the two types of lichen that constitute the winter diet for reindeers. The authors emphasize that even partial logging would render the area inhospitable for reindeer breeding for at least a century and possibly irrevocably, since the destruction of the trees would lead to an extension of the marsh, with the resulting change of the nutrition balance of the soil. Moreover, logging would merely add to present dangers threatening the trees within the authors' herding area, namely, industrial pollution from the Russian Kola district. In this context, it is submitted that silvicultural methods of logging (that is, environmentally sensitive cutting of forest areas) advocated by the authorities for some parts of the wilderness area used by the authors would cause possibly irreversible damage to reindeer herding, as the age structure of the forest and the conditions for the lichen growth would change.

2.8 With respect to the requirement of exhaustion of domestic remedies, the authors contend that the Finnish legal system does not provide for remedies to challenge the constitutionality or validity of an Act adopted by Parliament. As to the possibility of an appeal to the Supreme Administrative Tribunal against any future administrative decisions based on the Wilderness Act, the authors point out that the Finnish legal doctrine on administrative law has been applied very restrictively in accepting legal standing on grounds other than ownership. Thus, it is claimed that there are no domestic remedies which the authors might pursue in respect of a violation of article 27 of the Covenant.

The complaint

3.1 The authors submit that the passage of the Wilderness Act jeopardizes the future of reindeer herding in general and of their livelihood in particular, as reindeer farming is their primary source of income. Furthermore, since the Act would authorize logging within areas used by the authors for reindeer husbandry, its passage is said to constitute a serious interference with their rights under article 27 of the Covenant, in particular the right to enjoy their own culture. In this context, the authors refer to the views of the Human Rights Committee in cases Nos. 197/1985 and 167/1984, a/ as well as to ILO Convention No. 169 concerning indigenous and tribal people in independent countries.

3.2 The authors add that over the past decades, traditional methods used for reindeer breeding have decreased in importance and have been partly replaced by "fencing" and artificial feeding, which the authors submit are alien to them. Additional factors enabling an assessment of the irreparable damage to which wilderness areas in Finland are exposed include the development of an industry producing forest harvesting machinery and a road network for wood transport. These factors are said to affect deeply the enjoyment by the authors of their traditional economic and cultural rights.

3.3 Fearing that the Central Forestry Board would approve the continuation of road construction or logging by the summer of 1991, or at the latest by early 1992, around the road under construction and therefore within the confines of their herding areas, the authors requested the adoption of interim measures of protection, pursuant to rule 86 of the Committee's rules of procedure.

The State party's observations

4.1 In its submission under rule 91 of the rules of procedure, the State party does not raise objections to the admissibility of the communication under article 5, paragraph 2 (b), of the Optional Protocol, and concedes that in the present situation there are no domestic remedies which the authors should still pursue.

4.2 The State party indicated that for the Hammastunturi Wilderness, plans for maintenance and use currently in preparation in the Ministry of the Environment would not be finalized and approved until the spring of 1992; nor are there any logging projects under way in the residual area designated by the authors, which does not overlap with the Hammastunturi Wilderness. North of the Wilderness, however, minor "silvicultural felling" (to study the effect of logging on the environment) began in 1990 and would be stopped by the end of the spring of 1991. According to the Central Forestry Board, this particular forest does not overlap with the area designated in the communication. The State party added that south of the wilderness, the gravelling of an existing roadbed would proceed in the summer of 1991, following the entry into force of the Wilderness Act.

4.3 The State party contends that the communication is inadmissible under article 3 of the Optional Protocol, as incompatible with the provisions of the Covenant. In particular, it argues that the plans of the Central Forestry Board for silvicultural logging in the residual area outside the Hammastunturi Wilderness are not related to the passage of the Wilderness Act, because the latter only applies to areas specifically designated as such. The authority of the Central Forestry Board to approve logging activities in areas other than those designated as protected wilderness is not derived from the Wilderness Act. Accordingly, the State party denies that there is a causal link between the measures of protection requested by the authors and the object of the communication itself, which only concerns enactment and implementation of the Wilderness Act.

4.4 The State party further contends that the envisaged forestry operations, consisting merely of "silvicultural logging" and construction of roads for that purpose, will not render the areas used by the authors irreparably inhospitable for reindeer husbandry. On the contrary, the State party expects them to contribute to the natural development of the forests. In this connection, it points to a report prepared for the Ministry for Agriculture and Forestry by a professor of the University of Joensuu, who supports the view that timber production, reindeer husbandry, collection of mushrooms and berries and other economic activities may sustainably coexist and thrive in the environment of Finnish Lapland. This report states that no single forest or land use can, on its own, fulfil the income and welfare needs of the population; forest management of the whole area, and particularly Northern Lapland, must accordingly be implemented pursuant to schemes of multiple use and "strict sustainability".

4.5 The State party submits that the authors cannot be considered "victims" of a violation of the Covenant, and that their communication should be declared inadmissible on that account. In this context, the State party contends that the ratio legis of the Wilderness Act is the very opposite from that identified by the authors: its intention was to upgrade and enhance the protection of the Sami culture and traditional nature-based means of livelihood. Secondly, the State party submits that the authors have failed to demonstrate how their concerns about "irreparable damage" purportedly resulting from logging in the area designated by them translate into actual violations of their rights; they are merely afraid of what might occur in the future. While they might legitimately fear for the future of the Sami culture, the "desired feeling of certainty is not, as such, protected under the Covenant. There must be a concrete executive decision or measure taken under the Wilderness Act", before anyone may claim to be the victim of a violation of his Covenant rights.

4.6 The State party further argues that passage of the Wilderness Act must be seen as an improvement rather than a setback for protection of the rights protected by article 27. If the authors are dissatisfied with the amount of land protected as wilderness, they overlook the fact that the Wilderness Act is based on a philosophy of coexistence between reindeer herding and forest economy. This is not only an old tradition in Finnish Lapland but also a practical necessity, as unemployment figures are exceptionally high in Finnish Lapland. The Act embodies a legislative compromise trying to balance opposite interests in a fair and democratic manner. While the Government fully took into account the requirements of article 27 of the Covenant, it could not ignore the economic and social rights of that part of the population whose subsistence depends on logging activities: "one cannot do without compromises in a democratic society, even if they fail to satisfy all the parties concerned".

4.7 Finally, the State party notes that the Covenant has been incorporated into domestic law, and that, accordingly, article 27 is directly applicable before the Finnish authorities and judicial instances. Thus, if, in the future, the Ministry of the Environment were to approve a plan for forest maintenance and care which would indeed endanger the subsistence of Sami culture and thus violate article 27, the victims of such a violation could submit a complaint to the Supreme Administrative Court.

Admissibility considerations

5.1 During its forty-second session, in July 1991, the Committee considered the admissibility of the communication. It noted that the State party had raised no objection with regard to the admissibility of the communication under article 5, paragraph 2 (b), of the Optional Protocol. It further took note of the State party's claim that the authors could not claim to be victims of a violation of the Covenant within the meaning of article 1 of the Optional Protocol. The Committee reaffirmed that individuals can only claim to be victims within the meaning of article 1 if they are actually affected, although it is a matter of degree as to how concretely this requirement should be taken. b/

5.2 Inasmuch as the authors claimed to be victims of a violation of article 27, both in respect of expected logging and road construction activities within the Hammastunturi Wilderness and ongoing road construction activities in the residual area located outside the Wilderness, the Committee observed that the communication related to both areas, whereas parts of the State party's observations could be read in the sense that the communication only related to the Hammastunturi Wilderness.

5.3 The Committee distinguished between the authors' claim to be victims of a violation of the Covenant in respect of road construction and logging inside the Hammastunturi Wilderness and such measures outside the Wilderness, including road construction and logging in the residual area south of the Wilderness. In respect of the former areas, the authors had merely expressed the fear that plans under preparation by the Central Forestry Board might adversely affect their rights under article 27 in the future. This, in the Committee's opinion, did not make the authors victims within the meaning of article 1 of the Optional Protocol, as they were not actually affected by an administrative measure implementing the Wilderness Act. Therefore, this aspect of the communication was deemed inadmissible under article 1 of the Optional Protocol.

5.4 In respect of the residual area, the Committee observed that the continuation of road construction into it could be causally linked to the entry into force of the Wilderness Act. In the Committee's opinion, the authors had sufficiently substantiated, for purposes of admissibility, that this road construction could produce effects adverse to the enjoyment and practice of their rights under article 27.

5.5 On 9 July 1991, accordingly, the Committee declared the communication admissible in so far as it appeared to raise issues under article 27 of the Covenant.

5.6 The Committee also requested the State party to "adopt such measures, as appropriate, to prevent irreparable damage to the authors".

The State party's request for review of the admissibility decision and the authors' reply

6.1 In its submission under article 4, paragraph 2, dated 10 February 1992, the State party notes that the Committee's acceptance, in the decision of 9 July 1991, of a causal link between the Wilderness Act and any measures taken outside the Hammastunturi Wilderness has changed the substance of the communication and introduced elements in respect of which the State party did not provide any admissibility information. It reiterates that in applying the Wilderness Act, Finnish authorities must take into consideration article 27 of the Covenant, "which, in the hierarchy of laws, is on the same level as ordinary laws". Samis who claim that their Covenant rights were violated by the application of the Act may appeal to the Supreme Administrative Court in respect of the plan for maintenance and care of the Wilderness area approved by the Ministry of the Environment.

6.2 In respect of the activities outside the Hammastunturi Wilderness (the "residual area"), the State party submits that article 27 would entitle the authors to take action against the State or the Central Forestry Board before the Finnish courts. Grounds for such a legal action would be concrete measures taken by the State, such as road construction, which in the authors' opinion infringe upon their rights under article 27. A decision at first instance could be appealed to the Court of Appeal, and from there, subject to certain conditions, to the Supreme Court. The provincial government could be requested to grant provisional remedies; if this authority does not grant such a remedy, its decision may be appealed to the Court of Appeal and, subject to a re-trial permit, to the Supreme Court.

6.3 The State party adds that the fact that actions of this type have not yet been brought before the domestic courts does not mean that local remedies do not exist but merely that provisions such as article 27 have not been invoked until recently. Notwithstanding, the decisions of the higher courts and the awards of the Parliamentary Ombudsman in the recent past suggest that the impact of international human rights treaties is significantly on the increase. While the authors do not own the contested area, the application of article 27 gives them legal standing as representatives of a national minority, irrespective of ownership. The State party concludes that the communication should be deemed inadmissible in respect of measures taken outside the Hammastunturi Wilderness on the basis of article 5, paragraph 2 (b), of the Optional Protocol.

6.4 Subsidiarily, the State party reaffirms that current road construction activities in the "residual areas" do not infringe upon the authors' rights under article 27. It observes that the authors do not specify that the construction has caused real damage to reindeer husbandry. In this context, it observes that:

> "the concept of culture in the sense of article 27 provides for a certain degree of protection of the traditional means of livelihood for national minorities and can be deemed to cover livelihood and other conditions in so far as they are essential for the culture and necessary for its survival. The Sami culture is closely linked with traditional reindeer husbandry. For the purposes of ... article 27 ... it must be established, however, in addition to the aforementioned question of what degree of interference the article [protects] against, whether the minority practices its livelihood in the traditional manner intended in the article".

As Sami reindeer husbandry has evolved over time, the link with the natural economy of old Sami tradition has been blurred; reindeer husbandry is increasingly practised with help of modern technology, for example, snow scooters and modern slaughterhouses. Thus, modern reindeer husbandry managed by herdsmen's committees leaves little room for individual, self-employed, herdsmen.

6.5 The State party further denies that prospective logging in areas outside the Wilderness will infringe upon the authors' rights under article 27: "there is no negative link between the entry into force of the Wilderness Act and logging by the Central Forestry Board outside the wilderness area. On the contrary, enactment of the law has a positive impact on logging methods used in the residual areas". The State party explains that under the Act on Reindeer Husbandry, the northernmost State-owned areas are set aside for reindeer herding and shall not be used in ways that impair reindeer husbandry. The Central Forestry Board has decided that highlands (above 300 metres altitude) are subject to the most circumspect forestry. In Upper Lapland, a land and water utilization strategy approved by the Central Forestry Board that emphasizes the principle of multiple use and sustainability of resources applies.

6.6 It is recalled that the area identified in the authors' initial complaint comprises approximately 55,000 hectares (35,000 hectares of the Hammastunturi Wilderness, 1,400 hectares of highlands and 19,000 hectares of conservation forest. Out of this total, only 10,000 hectares, or 18 per cent, are set aside for logging. The State party notes that "logging is extremely cautious and the interests of reindeer husbandry are kept in mind". If one considers that logging is practised with strict consideration for the varied nature of the environment, forestry and land use in the area in question do not cause undue damage to reindeer husbandry. Furthermore, the significant increase in the overall reindeer population in Finnish Lapland over the past 20 years is seen as a "clear indication that logging and reindeer husbandry are quite compatible".

6.7 In respect of the authors' claim that thinning of the forests destroys lichen (lichenes and usnea) in the winter herding areas, the State party observes that other herdsmen have even requested that such thinning be carried out, as they have discovered that it alters "the ratio of top vegetation to the advantage of lichen and facilitates mobility. The purpose of [such] thinning is, inter alia, to sustain the tree population and improve its resistance to airborne pollution." Furthermore, according to the State party, lichen is plentiful in the highland areas where the Central Forestry Board does no logging at all.

6.8 The State party notes that Sami herdsmen own or co-own forests. Ownership is governed by a variety of legislative acts; the most recent, the Reindeer Farm

Act and Decree, also applies to Sami herdsmen. According to the State party, the authors own reindeer farms. Thinning of trees or logging of private forests is governed by the Private Forests Act. According to the Association of Herdsmen's Committees, the income derived from logging is essential for securing the herdsmen's livelihood, and, furthermore, forestry jobs are essential to forest workers and those Sami herdsmen who work in the forests apart from breeding reindeer. In the light of the above, the State party reaffirms that planned logging activities in the area identified by the complaints cannot adversely affect the practice of reindeer husbandry, within the meaning of article 27 of the Covenant.

7.1 In their comments, dated 25 March 1992, on the State party's submission, the authors contend that the State party's reference to the availability of remedies on account of the Covenant's status in the Finnish legal system represents a novelty in the Government's argumentation. They submit that this line of argument contrasts with the State party's position in previous Optional Protocol cases and even with that put forth by the Government at the admissibility stage of the case. The authors argue that while it is true that international human rights norms are invoked increasingly before the courts, the authorities would not be in a position to contend that Sami reindeer herdsmen have locus standi in respect to plans for maintenance and use of wilderness areas, or in respect of road construction projects in state-owned forests. Not only is there no case law in this respect, but Finnish courts have been reluctant to accept standing of any others than the landowners; the authors cite several judgements in support of their contention. [c]

7.2 Inasmuch as the alleged direct applicability of article 27 of the Covenant is concerned, the authors claim that while this possibility should not theoretically be excluded, there is no legal precedent for the direct application of article 27. The State party therefore wrongly presents a hypothetical possibility as a judicial interpretation. The authors reaffirm that no available and effective remedies exist in relation to road construction and other measures in the "residual area", which consists exclusively of state-owned lands. The Government's reference to the fact that the Covenant is incorporated into the domestic legal system cannot be deemed to prove that the domestic court practice includes even elementary forms of the approach now put forth by the State party, for the first time, to a United Nations human rights treaty body.

7.3 The authors challenge the State party's assessment of the impact of road construction into the area designated in their communication on the enjoyment of their rights under article 27. Firstly, they object to the State party's interpretation of the scope of the provision and argue that if the applicability of article 27 depended solely on whether the minority practices its "livelihood in the traditional manner", the relevance of the rights enshrined in the provision would be rendered nugatory to a large extent. It is submitted that many indigenous peoples in the world have, over time and owing to governmental policies, lost the possibility to enjoy their culture and carry out economic activities in accordance with their traditions. Far from diminishing the obligations of States parties under article 27, such trends should give more impetus to their observance.

7.4 While Finnish Sami have not been able to maintain all traditional methods of reindeer herding, their practice still is a distinct Sami form of reindeer herding, carried out in community with other members of the group and under circumstances prescribed by the natural habitat. Snow scooters have not destroyed this form of nomadic reindeer herding. Unlike Sweden and Norway, Finland allows reindeer herding for others than Samis; thus, the southern parts of the country are used by herdsmen's committees, which now largely resort to fencing and to artificial feeding.

7.5 As to the impact of road construction into their herding area, the authors reiterate that it violates article 27 because:

(a) Construction work already causes noise and traffic that has disturbed the reindeer;

(b) The two roads form "open wounds" in the forests with, on the immediate site, all the negative effects of logging;

(c) The roads have changed the pattern of reindeer movements by dividing the wilderness, thereby making it far more difficult to keep the herd together;

(d) Any roads built into the wilderness bring tourists and other traffic, which disturb the animals;

(e) As the Government has failed to provide reasonable justifications for the construction of the roads, their construction violates the authors' rights under article 27, as a mere preparatory stage for logging within their area.

7.6 Concerning the State party's assessment of logging operations in the areas designated by the communication, the authors observe that although the area in question is a small part of the Sami areas as a whole, logging within that area would re-start a process that lasted for centuries and brought about a gradual disintegration of the traditional Sami way of life. In this context, it is noted that the area in question remains one of the most productive wilderness areas used for reindeer herding in Finnish Lapland.

7.7 Still in the context of planned logging operations, the authors submit the reports of two experts, according to which: (a) under certain conditions, reindeer are highly dependent on lichens growing on trees; (b) lichen growing on the ground are a primary winter forage for reindeer; (c) old forests are superior to young ones as herding areas; and (d) logging negatively affects nature-based methods of reindeer herding.

7.8 The authors insist that the area designated in their communication has remained untouched for centuries, and that it is only in the context of the coming into force of the Wilderness Act that the Central Forestry Board began its plans for logging in the area. They further contend that if it is true, as claimed by the State party, that highlands (above 300 metres) are in practice free of Board activity, then their herding area should remain untouched. However, the two roads built into their area partly run above the 300 metre mark, which shows that such areas are well within the reach of Board activities. In this context, they recall that all of the area delineated in their complaint is either above the 300 metre mark or very close to it; accordingly, they dismiss the State party's claim that only 1,400 hectares of the area are highlands. Furthermore, while the authors have no access to the internal plans for logging in the area drawn up by the Central Forestry Board, they submit that logging of 18 per cent of the total area would indeed affect a major part of its forests.

7.9 As to the alleged compatibility of intensive logging and practising intensive reindeer husbandry, the authors note that this statement only applies to the modern forms of reindeer herding using artificial feeding. The methods used by the authors, however, are traditional, and for that the old forests in the area designated by the communication are essential. The winter of 1991-1992 demonstrated how relatively warm winters may threaten traditional herding methods. As a result of alternating periods with temperatures above and below zero degrees centigrade, the snow was, in many parts of Finnish Lapland, covered by a hard layer of ice that prevented the reindeer from getting their nutrition from the ground. In some areas without old forests carrying lichen on their branches, reindeer have been dying from hunger. In this situation, the herding area designated in the communication has been very valuable to the authors.

7.10 In several submissions made between September 1992 and February 1994, the authors provide further clarifications. By submission of 30 September 1992, they indicate that the logging plans of the Central Forestry Board for the Hammastunturi Wilderness are still in preparation. In a subsequent letter dated 15 February 1993, they indicate that a recent decision of the Supreme Court invalidates the State party's contention that the authors would have locus standi before the courts on the basis of claims brought under article 27 of the Covenant. This decision, which quashed a decision of the Court of Appeal granting a Finnish citizen who had been successful before the Human Rights Committee compensation, d/ holds that the administrative, rather than the ordinary, courts are competent to decide on the issue of the complainant's compensation.

7.11 The authors further indicate that the draft plan for use and maintenance of the Hammastunturi Wilderness was made available to them on 10 February 1993, and a number of them were going to be consulted by the authorities before final confirmation of the plan by the Ministry for the Environment. According to the draft plan, no logging would be carried out in those parts of the Wilderness belonging to the area specified in the communication and to the herding areas of the Sallivaara Herdsmen's Committee. The same is not, however, true for the respective areas of the Lappi Herdsmen's Committee; under the draft plan, logging would be carried out in an area of 10 square kilometres (called Peuravaarat) situated in the southernmost part of the Hammastunturi Wilderness and within the area specified in the original communication.

7.12 In submissions of 19 October 1993 and 19 February 1994, the authors note that negotiations on and preparation of a plan for use and maintenance of the Wilderness still have not been completed, and that the Central Forestry Board still has not made a final recommendation to the Ministry for the Environment. In fact, a delay until 1996 for the finalization of the maintenance plan is expected.

7.13 The authors refer to another logging controversy in another Sami reindeer herding area, where reindeer herdsmen had instituted proceedings against the Government because of planned logging and road construction activities in the Angeli district, and where the Government had argued that claims based on article 27 of the Covenant should be declared inadmissible under domestic law. On 20 August 1993, the Court of First Instance at Inari held that the case was admissible but without merits, ordering the complainants to compensate the Government for its legal expenses. On 15 February 1994, the Court of Appeal of Rovaniemi invited the appellants in this case to attend an oral hearing to take place on 22 March 1994. According to counsel, the Court of Appeal's decision to grant an oral hearing "cannot be taken as proof for the practical applicability of article 27 of the Covenant as basis for court proceedings in Finland, but at least it leaves [this] possibility open".

7.14 In the light of the above, the authors conclude that their situation remains in abeyance at the domestic level.

Post-admissibility considerations

8.1 The Committee has taken note of the State party's information, provided after the decision on admissibility, that the authors may avail themselves of local remedies in respect of road construction activities in the residual area, based on the fact that the Covenant may be invoked as part of domestic law and that claims based on article 27 of the Covenant may be advanced before the Finnish courts. It takes the opportunity to expand on its admissibility findings.

8.2 In their submission of 25 March 1992, the authors concede that some Finnish courts have entertained claims based on article 27 of the Covenant. From the submissions before the Committee it appears that article 27 has seldom been invoked before the local courts or its content guided the ratio decidendi of court decisions. However, it is noteworthy, as counsel to the authors acknowledges, that the Finnish judicial authorities have become increasingly aware of the domestic relevance of international human rights standards, including the rights enshrined in the Covenant. This is true, in particular, for the Supreme Administrative Tribunal and increasingly for the Supreme Court and the lower courts.

8.3 In the circumstances, the Committee does not consider that a recent judgement of the Supreme Administrative Tribunal, which makes no reference to article 27, should be seen as a negative precedent for the adjudication of the authors' own grievances. In the light of the developments referred to in paragraph 8.2 above, the authors' doubts about the courts' readiness to entertain claims based on article 27 of the Covenant do not justify their failure to avail themselves of possibilities of domestic remedies which the State party has plausibly argued are available and effective. The Committee further observes that according to counsel, the decision of the Court of Appeal of Rovaniemi in another comparable case, while not confirming the practical applicability of article 27 before the local courts, at least leaves this possibility open. Thus, the Committee concludes that an administrative action challenging road construction activities in the residual area would not be a priori futile, and that the requirements of article 5, paragraph 2 (b), of the Optional Protocol have not been met.

8.4 The Committee takes note of counsel's comment that a delay until 1996 is expected in the finalization of the plan of the Central Forestry Board for use and maintenance, and understands this as an indication that no further activities in the Hammastunturi Wilderness and the residual area will be undertaken by the State party while the authors may pursue further domestic remedies.

9. The Human Rights Committee therefore decides:

(a) That the decision of 9 July 1991 is set aside;

(b) That the communication is inadmissible under article 5, paragraph 2 (b), of the Optional Protocol;

(c) That this decision shall be communicated to the State party, to the authors and to their counsel.

[Adopted in English, French and Spanish, the English text being the original version.]

Notes

a/ Official Records of the General Assembly, Forty-third Session, Supplement No. 40 (A/43/40), annex VII.G, communication No. 197/1985 (Kitok v. Sweden), views adopted on 25 July 1988, para. 9.8; and ibid., Forty-fifth Session, Supplement No. 40 (A/45/40), annex IX.A, communication No. 167/1984 (Ominayak v. Canada), views adopted on 26 March 1990, para. 32.2.

b/ Ibid., Thirty-sixth Session, Supplement No. 40 (A/36/40), annex XIII, communication No. 35/1978 (Aumeeruddy-Cziffra v. Mauritius), views adopted on 9 April 1981, para. 5; and ibid., Thirty-seventh Session, Supplement No. 40 (A/37/40), annex XIV, communication No. 61/1979 (Hertzberg v. Finland), views adopted on 2 April 1982, para. 9.3.

c/ See, for example, judgement of 16 April 1992 of the Supreme Administrative Court in the Angeli case.

d/ Official Records of the General Assembly, Forty-fourth Session, Supplement No. 40 (A/44/40), annex X.J, communication No. 265/1987 (Antti Vuolanne v. Finland), views adopted on 7 April 1989.

D. Communication No. 433/1990, A. P. A. v. Spain (decision adopted on 25 March 1994, fiftieth session)*

Submitted by: A. P. A. (name deleted) (represented by counsel)

Alleged victim: The author

State party concerned: Spain

Date of communication: 13 December 1990 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 25 March 1994,

Adopts the following:

Decision on admissibility

1. The author of the communication is A. P. A., a Spanish citizen residing in Madrid. He claims to be the victim of a violation by Spain of article 14, paragraphs 1, 2 and 3 (a), (b), (c) and (e) of the International Covenant on Civil and Political Rights. The author is represented by counsel.

The facts as submitted by the author

2.1 The author was arrested on 7 October 1985 and charged with the robbery of several grocery shops. He was tried in the District Court (Audiencia Provincial) of Salamanca on 7 June 1986, found guilty as charged and sentenced to four years, two months and one day of imprisonment.

2.2 The author contends that the proceedings before the District Court suffered from various procedural defects. Throughout the trial he maintained his innocence, arguing that he had bought the groceries found in his possession the day before the alleged offence. The prosecution only tendered as evidence statements made by the author during interrogation. The court allegedly ignored large parts of the evidence, in particular some circumstantial evidence, without giving reasons. Furthermore, the Prosecutor allegedly only cross-examined the author and the defence witnesses but did not question the prosecution witnesses. Author's counsel protested against this and requested that more plausible evidence in support of the charge be produced; such evidence never materialized.

2.3 The author appealed to the Supreme Court of Spain on procedural grounds. On 2 June 1989, the Supreme Court confirmed the judgement of first instance. Allegedly because of summer holidays, the author was not notified of the Supreme Court's decision until 11 September 1989, that is considerably after the expiration of the deadline of 20 working days allowed for the filing of a constitutional motion against the decision (*recurso de amparo*).

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* The text of an individual opinion submitted by Mr. Francesco Aguilar is appended.

2.4 On 15 January 1990, A.P.A. appealed to the Constitutional Tribunal, alleging a breach of article 24 of the Constitution, which guarantees the right to a fair trial. On 26 February 1990, the Constitutional Tribunal declared the amparo inadmissible, as statutory deadlines for the filing of the motion had expired.

2.5 In the above context, the author notes that during the month of August, the Spanish judicial system is virtually paralysed because of summer holidays. For this reason, article 304 of the Spanish Civil Code stipulates that the month of August is not counted for the purpose of determining deadlines for the filing of appeals. Article 2 of an agreement (Acuerdo de Pleno) of 15 June 1982, however, stipulates that for the purpose of a number of procedures before the Constitutional Tribunal, including amparo proceedings, August does count for the determination of such deadlines.

The complaint

3. It is submitted that the above reveals violations by Spain of the author's rights under article 14, paragraphs 1, 2, and 3 (a), (b), (c) and (e) of the Covenant.

The State party's information and observations and the author's comments thereon

4.1 In its submission under rule 91 of the rules of procedure, the State party submits that the communication is inadmissible on the ground of non-exhaustion of domestic remedies. It refers to the author's own petition for amparo, which states "on 24 July 1989, the Supreme Court's decision was notified to the prosecutor, who immediately notified the author's legal representative". With this, the State party submits, its obligations under article 438 of the Organic Law on Judicial Administration (Ley Organica del Poder Judicial) have been complied with. Such delays as occurred thereafter in the submission of the request for amparo must be attributed to the author (respectively to his legal representative).

4.2 The State party adds that if the request for amparo was dismissed as out of time, this must mean, for purposes of the Optional Protocol, that domestic remedies have not been exhausted. Reference is made in this context to the established jurisprudence of the European Commission of Human Rights.

4.3 Apart from the arguments in paragraphs 4.1 and 4.2 above, the State party points to contradictions in the author's own version of the chronology of events. Thus, in a written submission to the Constitutional Tribunal of 20 September 1989, prepared and signed by A. P. A. himself, it is noted that "on 24 July 1989, this party was informed of the content of the judgement of the Second Chamber of the Supreme Court" ("Que con fecha 24 de Julio de 1989, se notificó a esta parte la sentencia dictada por la Sala Segunda del Tribunal Supremo ..."). Besides, the State party notes that it is implicit in the author's complaint about the "irrationality" of the Constitutional Tribunal sitting in August because of the quasi impossibility of obtaining legal advice during that month, that he was aware of the decision of the Supreme Court before the expiry of the deadline for his recourse for amparo.

4.4 With regard to the alleged violations of article 14, paragraphs 1 and 2, the State party affirms that the judgement of the Supreme Court speaks for itself, in that it reveals that there is no prima facie evidence of a violation of the right to a fair trial or of the presumption of innocence ("Lo expuesto prueba una vez más la ligereza con que la representación de los procesados

suelan apelar al fundamental principio de presunción de inocencia, sin base alguna, con grave quebranto del derecho de los justiciables a una pronta administración de justicia").

5.1 In his comments, the author reaffirms that the State party did not comply with the requirements of article 160 of the Law Governing the Institution of Criminal Proceedings (Ley de Enjuiciamiento Criminal), which stipulates that final judgements must be notified to the parties on the day they are released/signed, or at the very latest the day thereafter; it is submitted that the Supreme Court did not comply with the requirement. a/ In the author's opinion, article 160 must be understood to include a right of personal notification of the accused; it transpires from his submission that he does not consider that the inaction or the neglect of his counsel exonerates the judicial authorities from their obligations vis-à-vis himself.

5.2 The author further contends that the requirement of non-exhaustion of domestic remedies in article 5, paragraph 2 (b), of the Optional Protocol must be interpreted flexibly. It is submitted that the possibility of filing a request for amparo during the summer vacation period should not lead to the conclusion that requests for amparo which could have been filed during the month of August but were in fact filed outside that period must be dismissed as belated. The author also submits that the text of the agreement of 15 June 1982 cannot supersede other formal legislation setting statutory deadlines for the filing of appeals.

5.3 As to the presumed chronological inconsistencies in his own submissions (para. 4.3 above), the author contends that the date of 24 July 1989 clearly refers to the notification of the Supreme Court judgement to his counsel, not to himself.

5.4 Finally, with respect to the insufficiency of the evidence against him, the author refers to a report prepared at his request by two specialists in criminal procedure at the University of Granada. This report concludes that the pick-up van (furgoneta), which according to the prosecution was used to transport the goods seized in the robberies attributed to the author, could not possibly have transported all the goods. This, in the author's opinion, underscores that there was no real evidence against him, and that he did not receive a fair trial.

Issues and proceedings before the Committee

6.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The Committee has noted the parties' arguments relating to the question of exhaustion non-exhaustion of domestic remedies. It notes that while the month of August does not count for the determination of deadlines in the filing of most criminal appeals, it does count under regulations governing amparo proceedings before the Constitutional Tribunal. While it is true that local remedies within the meaning of article 5, paragraph 2 (b), of the Optional Protocol must only be exhausted to the extent that they are both available and effective, it is an established principle that an accused must exercise due diligence in the pursuit of available remedies. In this context, the principle that ignorance of the law excuses no one (ignorantia iuris neminem excusat) also applies to article 5, paragraph 2 (b), of the Optional Protocol.

6.3 In the instant case, the decision of the Supreme Court of 2 June 1989 was duly notified to the author's counsel. The author claims that counsel did not inform him of this notification until after the expiration of the amparo proceedings deadline. Nothing in the file before the Committee indicates that author's counsel was not privately retained. In the circumstances, counsel's inaction or neglect in communicating the Supreme Court's judgement to his client cannot be attributed to the State party but must be attributed to the author; the Committee does not consider that, under article 14 of the Covenant, it was incumbent upon the Supreme Court's registry or upon the Prosecutor's office to directly notify the author personally of the decision of 2 June 1989 in the circumstances of the case. It must, accordingly, be concluded that local remedies were not pursued with the requisite diligence, and, therefore, that the requirements of article 5, paragraph 2 (b), of the Optional Protocol have not been met.

7. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under article 5, paragraph 2 (b), of the Optional Protocol;

(b) That this decision shall be communicated to the State party and the author of the communication.

[Adopted in English, French and Spanish, the English text being the original version.]

Notes

a/ At the same time, the author's mother concedes that the procurator informed her son's lawyer in time of the decision of the Supreme Court, whereas the lawyer did not inform A. P. A. for some time thereafter.

Appendix

[Original: Spanish]

Individual opinion (concurring) submitted by Mr. Aguilar Urbina pursuant to rule 92, paragraph 3, of the rules of procedure of the Human Rights Committee, concerning communication No. 433/1990

(A. P. A. v. Spain)

1. While we agree with the observations of the Human Rights Committee on the communication in question, we believe that there is another significant aspect that should be borne in mind when considering admissibility.

2.1 It is clear that the author filed the amparo motion after the deadline expired. The author himself admitted - in his petition of 20 December 1989 - that on the previous 24 July he had been notified of the judgement of the Second Chamber of the Supreme Court. The term of 20 working days within which the author had to file the motion should be calculated as of that date. The author admits that he did not do so because the Spanish judicial system is virtually paralysed during the month of August; by using the word "virtually", the author's statement intimates that during the holiday period, not all judicial offices are paralysed.

2.2 The author concedes, moreover, that there was negligence or omission on the part of his counsel, but holds that the conduct cannot be imputed to himself. However, it cannot be maintained that the supposed negligence of the author's lawyer can be ascribed to the State party and not to the author himself, who should have made the necessary arrangements to take the requisite steps within the time-periods established by law.

3. It may be concluded, from the facts described by the author and the State party, that the amparo motion submitted to the Constitutional Tribunal was rejected because of negligence attributable to the author. We therefore agree with the Committee that local remedies have not been exhausted. Nevertheless, since the non-exhaustion can be attributed to negligent conduct on the part of the author, in our view the right to submit communications to the Human Rights Committee under the Optional Protocol has also been abused. We consequently believe that the communication submitted by A. P. A. is inadmissible under the terms of article 3 of the Optional Protocol.

E. Communication No. 436/1990, Manuel Solís Palma v. Panama (decision adopted on 18 July 1994, fifty-first session)

Submitted by:	Renato Pereira
Alleged victim:	Manuel Solís Palma
State party:	Panama
Date of communication:	20 October 1990 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 18 July 1994,

Adopts the following:

Decision on admissibility

1. The author of the communication is Renato Pereira, a Panamanian attorney born in 1936 and a resident of Paris at the time of submission of the communication. He acts on behalf of Manuel Solís Palma, a Panamanian citizen born in 1917 and formerly the President of the Republic of Panama. He contends that at the time of submission of the complaint, Mr. Solís Palma was unable to submit the communication himself, as he was prosecuted by the current Government of Panama and was hiding from its agents. It is submitted that Mr. Solís Palma is a victim of violations by Panama of articles 9 and 10 of the International Covenant on Civil and Political Rights.

The facts as submitted by the author

2.1 On 21 September 1990, the Third District Attorney of Panama City (Juzgado Tercero del Circuito de Panamá) ordered the arrest and detention of Mr. Solís Palma, on charges of having established and organized the so-called Committee for the Defence of Panama and of Dignity (Comité de Defensa de Panamá y de la Dignidad), a unit of elite soldiers which resisted the intervention of troops from the United States of America in Panama in December 1989.

2.2 It is submitted that Mr. Solís Palma acted legitimately *vis-à-vis* the United States intervention. Article 306 of the Constitution of Panama indeed obliges all Panamanian citizens to defend the integrity of Panamanian territory and the sovereignty of the State.

2.3 As to the requirement of exhaustion of domestic remedies, Mr. Pereira notes that Mr. Solís Palma's representative in Panama submitted a request for bail to the examining magistrate handling the case; the request was dismissed. The author notes that the only other possibility of a remedy would be to file a request for *habeas corpus* in the Supreme Court of Panama; he contends that such a request would be futile given the political climate in Panama and the particular circumstances of Mr. Solís Palma's situation.

2.4 In further submissions made in 1992 and 1993, Mr. Pereira indicates that Mr. Solís Palma was able to leave the territory of Panama and secured political asylum in Venezuela; he is now residing in Caracas. He indicates that the trial for Mr. Solís Palma and a number of co-defendants was scheduled to start on

19 May 1993 before the Fourth District Judge of Panama (Juez Cuarto de lo Penal del Primero Circuito Judicial de Panamá), and that the indictment of Mr. Solís Palma had been changed to include not only crimes against the internal State order but also crimes against humanity. He objects to the qualification of the offences imputed to Mr. Solís Palma as "political crimes".

The complaint

3. It is submitted that the facts as submitted reveal violations by Panama of articles 9, paragraph 1, and 10 of the Covenant, even though Mr. Solís Palma has not been arrested or detained.

The State party's information and observations

4.1 In its submission under rule 91 of the rules of procedure, the State party observes that the trial against Mr. Solís Palma and three co-defendants began as scheduled on 19 May 1993. Mr. Solís Palma was tried *in absentia*; he was, however, represented by an attorney assigned to him *ex officio* by the judicial authorities of Panama. On 4 June 1993, the circuit court judge found Mr. Solís Palma and the three co-accused guilty on the count of offences against the internal State order; they were sentenced to 44 months and 10 days of imprisonment and prohibited from running for public office for the same period of time. All accused were acquitted on the count of crimes against humanity.

4.2 The court's decision was notified to all accused, in Mr. Solís Palma's case through publication of the sentence in the Official Gazette and a major daily newspaper. Although the representatives of Mr. Solís Palma's co-defendants initially appealed the sentence, they later withdrew the appeal. It appears that the representative for Mr. Solís Palma did not appeal.

4.3 The State party concludes that by February 1994, the cases have been filed, because the time spent in preventive detention by the accused (with the exception of Mr. Solís Palma) was set off against the prison term imposed upon them. They have been released and no charges against them are pending.

Issues and proceedings before the Committee

5.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

5.2 The Committee has noted Mr. Pereira's claim that as a personal friend of Mr. Solís Palma, he acted in the latter's best interest by filing a claim on his behalf under the Optional Protocol, and that he should be deemed to have standing within the meaning of article 1 of the Protocol. It further observes that on two occasions, by letters of 21 February 1991 and 25 August 1992, Mr. Pereira was requested to provide a copy of a power of attorney duly signed by the alleged victim or a member of his family. He did not comply with this request, despite the fact that by the summer of 1992, Mr. Solís Palma had been granted political asylum in Venezuela and therefore would have been in a position to authorize Mr. Pereira to represent him before the Committee.

5.3 In the light of the above and in the absence of a power of attorney or other documented proof that the author is authorized to act on behalf of Mr. Solís Palma, the Committee concludes that the author has no standing before the Committee, within the meaning of article 1 of the Optional Protocol.

6. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under article 1 of the Optional Protocol;

(b) That this decision shall be communicated to the State party and the author of the communication.

[Adopted in English, French and Spanish, the English text being the original version.]

F. Communication No. 452/1991, Jean Glaziou v. France (decision adopted on 18 July 1994, fifty-first session)

Submitted by: Jean Glaziou

Alleged victim: The author

State party: France

Date of communication: 16 November 1990

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 18 July 1994,

Adopts the following:

Decision on admissibility

1. The author of the communication is Jean Glaziou, a French citizen born in 1951, currently detained at the prison of Muret, France. He claims to be a victim of violations by France of articles 9, 10, 14 and 17 of the International Covenant on Civil and Political Rights.

The facts as submitted by the author and the State party

2.1 On 13 November 1987, the author was arrested and detained in Hasselt, Belgium, on charges of theft, fraud, embezzlement, forgery, fraud of cheques, etc. On 19 July 1988, he was tried in the Criminal Court of Antwerp, Belgium; he was found guilty as charged and sentenced to three years' imprisonment.

2.2 At the same time, in January 1988, the public prosecutor's office at the High Court (Tribunal de grande instance) of Coutances, France, was seized of allegations of similar offences committed by the author in France. On 9 May 1988, the examining magistrate (juge d'instruction) of the High Court of Coutances issued a warrant for the author's arrest; the author was indicted inter alia, for theft, aggravated theft, embezzlement, fraud, forgery and use of forgeries, and several counts of check fraud.

2.3 The district prosecutor forwarded the arrest warrant, together with a request to the Belgian authorities to extradite the author, to the French Ministry of Justice. On 13 June 1988, the latter transmitted the request to the French Ministry for Foreign Affairs, in accordance with article 4 of the French-Belgian Extradition Treaty of 15 August 1874. a/ By a note verbale of 4 April 1989, the Belgian Ministry for Foreign Affairs informed the French Embassy in Brussels that the Government of Belgium was willing to extradite Jean Glaziou to France, but not until he had served part of his prison term in Belgium.

2.4 On 29 May 1989, the author was extradited to France; on 31 May 1989, he was brought before the examining magistrate of Coutances, who ordered his committal. On 27 December 1989, the French Ministry of Justice requested the Belgian authorities to grant an extension to the indictment on which the extradition request had been based, on the ground that new facts had been discovered which resulted in new charges against the author, for which extradition had not been granted.

2.5 The examining magistrate of Coutances issued an extended warrant of arrest on 26 September 1989, which was transmitted through diplomatic channels to the Belgian authorities. On 22 January 1990, the Belgian Ministry for Foreign Affairs informed the French Embassy that the extension of the extradition was granted for the charges appearing on the warrant of 26 September 1989, with the exception of two offences. On 25 May 1990, the examining magistrate referred the author's case to the Criminal Court of Coutances (Tribunal correctionnel), which, on 10 July 1990, sentenced the author to seven years' imprisonment.

2.6 During the period of his provisional detention, b/ the author several times appealed against the examining magistrate's orders concerning the prolongation of his detention; these appeals were rejected by the Court of Appeal of Caen. On 17 October 1990, the Court of Appeal of Caen dismissed the author's appeal against conviction and sentence. An appeal against this decision was rejected by the Criminal Chamber of the Court of Cassation (Chambre criminelle de la Cour de cassation) on 20 August 1991.

2.7 On 2 December 1991, the author filed a complaint with the European Commission of Human Rights based on the following grounds: that the international warrant of arrest was null and void; that his extradition was illegal; that all hearings in his case were null and void; that he was tried twice for the same offences; that his defense rights had been violated; that he was not tried within reasonable time; that he was arbitrarily detained; and that he had been subjected to arbitrary and unlawful interference with his private/family life, and correspondence. In July 1992, the author's case was registered before the Commission as case No. 20313/92. On 3 December 1992, the Commission declared the case inadmissible; it found the author's complaints manifestly ill-founded.

The complaint

3.1 The author alleges procedural irregularities in connection with his extradition to France. He points to the absence of certain documents, which, according to him, are indispensable in the event of extradition. c/ He submits that in extradition cases, only officers of INTERPOL are entitled to hand over an accused to the requesting State, and that in his case no INTERPOL officer was present. He further submits that the extradition request was based upon a text which does not authorize the extradition of persons, d/ and not on the French-Belgian Extradition Treaty. He contends that the request for his extradition was not examined by the competent authorities, but was simply an arrangement between the French and Belgian prosecutors. The same illegal procedure was allegedly followed in the request for extension of the indictment. According to the author, the French-Belgian Extradition Treaty of August 1874 provides that in such cases, permission of the accused is required. He concludes that, because of the irregularities in the extradition procedure, all judicial proceedings against him were null and void, and that he was arbitrarily detained.

3.2 The author points out that he was arrested and detained on 13 November 1987 and that the preliminary investigations in France were opened in early January 1988, but that it took the examining magistrate another two years and four months, that is, until 25 May 1990, to complete the enquiry. He submits that the delay in the preliminary investigations in his case is unreasonable, in particular because he was kept detained. According to the author, there were no reasons to keep him detained; moreover, the period of incarceration is said to be disproportionate to the offences committed, "since he did not use violence, and it only prejudiced those who could financially afford it".

3.3 The author complains that prior to his extradition, he was already found guilty by the prosecutor and the examining magistrate of Coutances, and that the preliminary investigations in his case were merely a formality. He complains that the examining magistrate did not check his alibi and refused to hear witnesses on his behalf. He claims that he was forced to confess guilt and that all magistrates dealing with his case were biased. In this context, he submits that the judges of the Court of Cassation took advantage of the fact that his lawyer was on holiday to rule on his appeal. As to his defense, he claims that his legal aid lawyers were put under considerable pressure by the courts, and that on two occasions his lawyers were not even notified that a hearing was to be held. Furthermore, he submits that the offences he allegedly committed in Switzerland, Belgium and France are "concomitant, connected and inseparable"; since he had already been convicted in Belgium for the offences mentioned in the warrant, the French authorities, by prosecuting him again, violated the principle of non bis in idem.

3.4 The author complains about inhuman treatment; in this context, he submits that his correspondence is intercepted (for example, by the substitute prosecutor of Caen and by an official of the Ministry of Justice). He further complains that his friends and relatives have cut off all contact with him because of certain forms of persecution to which they allegedly have been subjected. He finally alleges that he was hit by warders of the prison at Fresnes, without giving any further details.

3.5 The above is said to amount to violations by France of articles 9, 10, 14 and 17 of the Covenant.

The State party's information and observations

4.1 By submission of 14 January 1993, the State party points out that, in so far as the author's complaints about the extradition procedure are directed against Belgium, the communication is inadmissible. It is submitted that, in so far as these claims concern France, they are identical to the claims which were dismissed by the Court of Appeal of Caen on 17 October 1990. The Court found itself precluded from considering these claims under article 385 of the Code of Criminal Procedure, which provides that a defense on procedural grounds (That is, challenges related to the indictment or to a previous procedure) should be presented in court prior to any defense on substantive issues. In the State party's opinion, the incorrect use of a domestic remedy should be equated with a failure to resort to such a remedy. This part of the communication is therefore said to be inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

4.2 As to the author's complaint that he was punished, in violation of the principle of non bis in idem, for the same offences as those for which he had already been convicted in Belgium, the State party, on the one hand, submits that this claim is inadmissible ratione materiae within the meaning of article 3 of the Optional Protocol. It argues that this part of the communication is incompatible with article 14, paragraph 7, of the Covenant, since this provision only applies to judicial decisions of a single State and not of different States. Reference is made to communication No. 204/1986, e/ where the Committee held that article 14, paragraph 7, prohibits double jeopardy only with regard to an offence adjudicated in a given State. On the other hand, the State party affirms that article 392 of the French Code of Criminal Procedure provides that [in certain cases] no prosecution will take place when the accused shows that he has been finally tried in a foreign country and, in case of conviction, that he has served his sentence or that he has been pardoned. The State party submits that, accordingly, the French courts did address this particular claim and found that none of the facts covered by the indictment had been examined by the Belgium courts.

4.3 As to the author's claim of inhuman treatment because of alleged interception of his correspondence, the State party submits that this argument is incompatible _ratione materiae_ with the provisions of article 10 of the Covenant. Furthermore, the issue of alleged interference with his correspondence was raised by the author during the judicial proceedings against him. The claim was rejected by the judges and the author was advised to initiate civil proceedings. The State party points out that the author has failed to do so, and that this part of the communication is therefore also inadmissible because of non-exhaustion of domestic remedies.

4.4 With regard to the author's complaint about the delay in the judicial proceedings against him, the State party submits that, taking into account the fact that when the preliminary enquiry was opened in France, the author was absent and could therefore not be interrogated by the examining magistrate, and that three jurisdictions were involved in the matter, the criminal proceedings cannot be qualified as unreasonably prolonged. Furthermore, the State party points out that the author was tried on 10 July 1990, that his appeal was heard 3 months later, on 17 October 1990 and that his appeal in cassation was heard on 20 August 1991, that is to say, 10 months later. As to the length of the author's provisional detention, it is submitted that the judicial authorities rejected the author's applications for release because there was a danger that he would abscond and because of his previous criminal record. Furthermore, the period of provisional detention was set off against his sentence. The State party concludes that the above-mentioned claims are an abuse of the right of submission (_manifestement abusif_), and should be declared inadmissible under article 3 of the Optional Protocol.

5. By submission of 3 March 1993, the author maintains that his extradition was unlawful; he complains that the Court of Appeal and Court of Cassation refused to pronounce themselves on his extradition, and that no documents concerning his extradition have ever been produced.

6. In a further submission, dated 18 October 1993, the State party submits that the communication is inadmissible under article 5, paragraph 2 (a), of the Optional Protocol, as the same matter was already examined and declared inadmissible by the European Commission of Human Rights. It recalls that upon ratifying the Optional Protocol, France entered a reservation in respect of article 5, paragraph 2 (a), to the effect that: "[T]he Human Rights Committee shall not have competence to consider a communication from an individual if the same matter is being or has already been considered under another procedure of international investigation or settlement" ("La France fait une réserve à l'alinéa a) du paragraphe 2 de l'article 5 en précisant que le Comité des droits de l'homme ne sera pas compétent pour examiner une communication émanant d'un particulier si la même question est en cours d'examen ou a déjà été examinée par une autre instance internationale d'enquête ou de règlement"). The State party notes that the claims raised by the author before the European Commission are in substance the same as those placed by him before the Human Rights Committee, and that the provisions of the European Convention for the Protection of Human

Rights and Fundamental Freedoms invoked by him are identical to those of the International Covenant on Civil and Political Rights.

Issues and proceedings before the Committee

7.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

7.2 The Committee has taken note of the State party's argument relating to the applicability of article 5, paragraph 2 (a), of the Optional Protocol. It notes that the author's claim that he was hit by prison warders was not before the European Commission. It considers, however, that the author has failed to substantiate this allegation, for purposes of admissibility. As to the author's remaining allegations, the Committee notes that the author's complaint before the European Commission was based on the same events and facts as the communication that was submitted under the Optional Protocol to the Covenant, and that it raised substantially the same issues; accordingly, the Committee is seized of the "same matter" as the European Commission of Human Rights was, and is, in light of the reservation of France to article 5, paragraph 2 (a), of the Optional Protocol, precluded from considering the author's communication. Finally, as to the author's claim that the French authorities continue to interfere with his correspondence, the Committee notes that the author has failed to exhaust available domestic remedies.

8. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible;

(b) That this decision shall be communicated to the State party and to the author of the communication.

[Adopted in English, French and Spanish, the English text being the original version.

Notes

a/ This treaty provides that a request for extradition should be made through diplomatic channels.

b/ From 31 May 1989, the date of the commital order, to 10 July 1990, the date of conviction.

c/ The complaint about the lack of certain documents is, however, primarily directed against Belgium. According to the author, the required documents in the case are: a (well-argued) advice of the indictment division of the Belgian court that pronounced itself on his extradition, the ministerial order for his extradition and the Royal Decree on his extradition.

d/ The warrant for the author's arrest mentions the European Convention on Mutual Assistance in Criminal Matters of 20 April 1959.

e/ Official Records of the General Assembly, Forty-third Session, Supplement No. 40 (A/43/40), annex VIII.A, communication No. 204/1986 (A. P. v. Italy, declared inadmissible on 2 November 1987, at the Committee's thirty-first session.

G. Communication No. 471/1991, Theophilus Barry v. Trinidad and Tobago (decision adopted on 18 July 1994, fifty-first session)

Submitted by: Theophilus Barry (represented by counsel)

Alleged victim: The author

State party: Trinidad and Tobago

Date of communication: 29 September 1991

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 18 July 1994,

Adopts the following:

Decision on admissibility

1. The author of the communication is Theophilus Barry, a Trinidadian citizen currently detained at the State Prison in Port-of-Spain, Trinidad and Tobago. Although he does not invoke the International Covenant on Civil and Political Rights, it appears from his submissions that he claims to be a victim of violations by Trinidad and Tobago of article 14 of the Covenant. He is represented by counsel.

The facts as submitted by the author

2.1 The author was arrested on 3 April 1980 and charged with the murder of one C. A. at a recreation club, which had occurred earlier the same day. He was brought before an examining magistrate on 6 April; the preliminary hearing was held in July 1980. The author was tried in the Port-of-Spain Assizes Court. On 17 July 1981, he was found guilty as charged and sentenced to death. The Court of Appeal of Trinidad and Tobago dismissed his appeal on 8 February 1983. The Judicial Committee of the Privy Council dismissed his subsequent petition for special leave to appeal in February 1985.

2.2 In March 1985, the author submitted a petition to the Trinidadian Advisory Council for Pardons; he did not receive a reply. A warrant for his execution, to take place on 10 July 1986, was read out to him less than 24 hours before the scheduled date of execution. His legal aid lawyer in Trinidad and Tobago obtained a stay of execution and filed a constitutional motion on his behalf; it is not clear whether this motion has ever been heard. On 4 January 1994, the author was informed that his death sentence had been commuted to life imprisonment by order of the President of Trinidad and Tobago, as a result of the findings of the Judicial Committee of the Privy Council in the case of Earl Pratt and Ivan Morgan v. the Attorney-General of Jamaica. [a]

2.3 The case for the prosecution was that during the night of 2 April 1980, C. A. and the author had been in the recreation club. C. A. had left the club at about 4 a.m., but had returned at about 6 a.m. and had gone into a separate room. The author, who was still in the club, was seen to enter this room, together with a woman who pointed out C. A. to him. The author and the woman then left the club. After approximately 30 minutes, the author returned to the club, went to the room where C. A. was now asleep on the floor and stabbed him in the chest with a knife. The stabbing was witnessed by one person; several other witnesses testified that when the author emerged from the room with a blood-stained knife in his hand, he made certain remarks from which it could be inferred that he had stabbed C. A. The prosecution further relied on an incriminating statement allegedly made by the author to the police in the morning of 3 April 1980. The statement was admitted in evidence after a voir dire.

2.4 During the trial, the author testified that he had been robbed by C. A., that this had been witnessed by a woman and that, upon her advice, he had gone to the nearest police station to report the incident. He had then returned to the club and told C. A. that he had reported him to the police, whereupon C. A. attacked him with a knife and was killed in the ensuing struggle. The author further testified that the investigating officer had forced him to sign a confession statement under duress. The defence did not call any witnesses to testify on the author's behalf.

The complaint

3.1 The author claims that his trial was unfair, in violation of article 14 of the Covenant. In this context, he states that the attorney initially assigned to him for the trial did not represent him in the Assizes Court; another lawyer was then assigned to him. He contends that although he instructed this lawyer, the latter disregarded his instructions and did not challenge numerous discrepancies in the testimonies of the prosecution witnesses.

3.2 The author further states that the investigating officer testified in court that he had charged the author with murder in the morning of 3 April 1980, whereas the result of the post-mortem examination performed by the forensic expert was not known until the afternoon of the same day. According to the author, it was illegal to charge him before the result of the post-mortem examination was known. Furthermore, he contends that the person performing the post-mortem examination was not a qualified pathologist, and that his diagnosis was therefore unreliable. He complains that no chemistry report (relating to the blood stains or fingerprints on the knife) was produced in court, nor was the gun produced with which the investigating officer allegedly threatened and forced him to sign the statement.

3.3 The author submits that the judge should not have allowed the trial to proceed, because of the discrepancies in the evidence and because it was clear that his attorney was not properly representing him. He adds that he would like to submit corroborative evidence, but that he has encountered difficulties, since 1983, in obtaining all the relevant court documents. Numerous requests to obtain these documents from the Office of the Attorney-General, the Registry of the Assizes Court, the Court of Appeal and his lawyers went unanswered.

The State party's observations and the author's comments thereon

4. The State party, in its submission of 27 July 1992, confirms that the author has exhausted domestic remedies in his criminal case, and adds that a constitutional motion was filed on his behalf.

5. In subsequent submissions, the author reiterates his complaint that the judicial authorities in Trinidad and Tobago have failed to provide him with the relevant court documents for the purpose of his communication to the Human Rights Committee. Furthermore, by letters of 27 May and 7 July 1993, counsel in

London, who represents the author before the Committee, submits that all her requests to obtain the court documents from the competent authorities and the author's legal aid lawyers in Trinidad and Tobago have been unsuccessful. She indicates that, without the documents, she is unable to make representations on Mr. Barry's behalf.

6. Under cover of a note verbale, dated 2 July 1993, the State party forwards to the Committee the Court of Appeal's written judgement in Theophilus Barry's case.

Issues and proceedings before the Committee

7.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

7.2 The Committee notes that the State party does not object to the admissibility of the communication. Nevertheless, it is the Committee's duty to ascertain whether all the admissibility criteria laid down in the Optional Protocol have been met.

7.3 The Committee considers that the author has failed to substantiate, for purposes of admissibility, that he was inadequately represented during his trial and that this made the trial an unfair one. He has not indicated which instructions he wanted his lawyer to carry out or on what issues the lawyer failed to cross-examine the prosecution witnesses. Rather his claims have remained blanket allegations. This part of the communication is therefore inadmissible under article 2 of the Optional Protocol.

7.4 The Committee further observes that the author's other allegations all relate to the evaluation of facts and evidence by the trial judge. It recalls that it is generally for the appellate courts of States parties to the Covenant to evaluate the facts and the evidence in a particular case. It is not, in principle, for the Committee to review the facts and evidence presented to, and evaluated by, the domestic courts, unless it can be ascertained that the proceedings were arbitrary that there were procedural irregularities amounting to a denial of justice, or that the judge violated his obligation of impartiality. After consideration of the material placed before it, the Committee does not find that the trial suffered from such defects. Accordingly, this part of the communication is inadmissible under article 3 of the Optional Protocol.

8. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under articles 2 and 3 of the Optional Protocol;

(b) That this decision shall be transmitted to the State party, to the author and to his counsel.

[Adopted in English, French and Spanish, the English text being the original version.]

Notes

a/ Privy Council Appeal No. 10 of 1993; judgment delivered on 2 November 1993.

H. Communication No. 475/1991, S. B. v. New Zealand (decision adopted on 31 March 1994, fiftieth session)

Submitted by: S. B. [name deleted] (represented by counsel)

Alleged victim: The author

State party: New Zealand

Date of communication: 3 September 1991

The Human Rights Committee established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 31 March 1994,

Adopts the following:

1. The author of the communication is S. B., a British citizen, currently residing in Paraparauma Beach, New Zealand. He claims to be a victim of a violation of article 26 of the Covenant by New Zealand and the United Kingdom of Great Britain and Northern Ireland. He is represented by counsel. The Optional Protocol entered into force for New Zealand on 26 August 1989. Since the United Kingdom is not a party to the Optional Protocol, the communication is not receivable, pursuant to article 1 of the Optional Protocol, in so far as it relates to that country.

The facts as submitted by the author

2.1 The author was born in 1911 and participated in a contributory United Kingdom social security scheme from the age of 16. In 1971, he moved to Jersey, where he had found employment. As of 1976, while still residing in Jersey, he received the full, inflation adjusted, United Kingdom pension, as well as 18 per cent of the full Jersey retirement pension.

2.2 In September 1987, the author moved to New Zealand to live with his children. The author was notified by the United Kingdom Department of Health and Social Security that, while residing in New Zealand, he would be entitled to continue to receive the full United Kingdom pension, as it stood at that moment, but not further adjustments for United Kingdom inflation.

2.3 As of 29 September 1987, the author, upon his request, was granted a New Zealand national pension ("superannuation"). Pursuant to a United Kingdom/New Zealand Convention on Social Security, for the period of 29 September 1987 to 19 January 1988, the New Zealand national pension was assessed at a reduced rate, which took into account the United Kingdom Retirement Pension the author was receiving. Later, the United Kingdom Retirement Pension was withheld, on the ground that by then the author was receiving a full New Zealand pension.

2.4 On 23 March 1988, the author was informed that the retirement pension he received from Jersey was to be deducted from his national pension, under section 70 (1) of the New Zealand Social Security Act. This section requires a New Zealand benefit to be reduced by an amount equal to any overseas pension which "forms part of a programme providing benefits, pensions or periodical allowances for any of the contingencies for which benefits, pensions or allowances may be paid under this part of the Act", if the overseas programme is administered by or on behalf of the Government of the country concerned. As an overpayment had taken place for the period between 29 September 1987 and 15 March 1988, the author was requested to repay the sum of $603.09.

2.5 On 14 April 1988, the author's daughter applied for a review of the decision on behalf of her father. It was submitted that the Jersey pension was not comparable to the British or New Zealand pension, as it was employment-related; furthermore, that Jersey was technically not part of the United Kingdom and had no reciprocal arrangement with New Zealand. The application for review was dismissed by the Porirnu District Review Committee on 30 November 1988. The Review Committee considered that the decision to deduct S. B.'s Jersey pension from his New Zealand pension entitlement was correct, having regard to section 70 (1) of the Social Security Act.

2.6 The author's case was then referred to the Social Security Appeal Authority. The Authority considered that S. B. had been unable to provide any reasons why the Jersey pension should be exempt from the provisions of section 70 (1) of the Act and dismissed the appeal. However, the Authority decided to write off the debt of $603.09, considering that it would be inequitable in view of the author's age, the strength of his conviction about the injustice of the situation and the way that it appeared to have affected his health, to require repayment of the debt.

2.7 Following the dismissal of the appeal, the author tried to seek a solution through other channels. On 13 July 1988, he wrote a letter to the Ombudsman, who replied, on 1 August 1988, that he was precluded from conducting an investigation, as other review procedures were still available. He also approached a New Zealand television programme, "Fair Go", which forwarded his complaint to the Minister of Social Welfare. By letters of 28 September, 19 October and 27 November 1989, the author submitted his complaint to the New Zealand Human Rights Commission, which replied that the matter was outside its jurisdiction. He further addressed letters to a Member of Parliament, to the Minister of Social Welfare and to the Prime Minister of New Zealand, all to no avail.

The complaint

3.1 The author complains that his "human rights of lawful and rightful possession" and his right to equality have been violated. He alleges that he has been discriminated against because he is an elderly immigrant. He claims to be a victim of a violation of article 26 of the Covenant.

3.2 More specifically, the author claims that section 70 (1) of the 1964 New Zealand Social Security Act discriminates against foreign immigrants, as a New Zealand citizen who has worked all his life in New Zealand, may receive two pensions, that is, the New Zealand social welfare pension plus any private pension.

The State party's submission and the author's comments thereon

4.1 By submission of 13 November 1992, the State party argues that the communication is inadmissible. It adds that part of the communication appears to be directed against the United Kingdom.

4.2 The State party argues that the author has not exhausted all available domestic remedies, since he failed to appeal the decision of the Social Security Appeal Authority to the High Court.

4.3 The State party also argues that the communication is inadmissible because the author has failed to substantiate that he is a victim of a violation of any of the rights set forth in the Covenant so as to justify a claim under article 2 of the Optional Protocol. In this context, the State party contends that the author has failed to show in what manner section 70 (1) would operate in a discriminatory way. The State party emphasizes that the section draws no distinction between recipients of benefits on the basis of any status whatsoever and that the section is applicable to all persons entitled to receive benefits under the Social Security Act. Beneficiaries, whether New Zealanders or foreigners and whether elderly or otherwise, who receive benefits of the kind characterized in the section from abroad, will be liable to a reduction of benefit. The State party therefore argues that section 70 (1) is not prima facie discriminatory and refers to the Committee's decision with regard to communication No. 212/1986. a/

4.4 The State party moreover argues that section 70 (1) does not have a discriminatory effect in practice. In this connection, the State party explains that the purpose of section 70 (1) is to ensure the equal treatment of persons who are in receipt of a New Zealand social security benefit and to prevent a situation in which persons also receiving a similar benefit from another Government are placed in an advantageous position.

4.5 The State party further argues that the communication is incompatible with the provisions of the Covenant. The State party contends that the author has not shown that he is a victim of a violation of a right that is protected by the Covenant. In this context, the State party submits that the author has not shown that he has been discriminated against on any of the grounds enumerated in article 26 of the Covenant. The State party argues that the fact that the author receives pension benefits from abroad does not give him any "status" within the meaning of article 26. In this context, the State party refers to the Committee's decision with regard to communication No. 273/1988, b/ declaring the communication inadmissible inter alia because the authors had failed to demonstrate that the treatment complained of constituted discrimination on any ground, including "other status", covered by article 26.

4.6 Finally, the State party submits that it is open to the author at any time to relinquish his entitlement to a benefit under the New Zealand Social Security Act and to rely on his British and Jersey pensions.

5.1 In his comments on the State party's submission, counsel argues that an appeal to the High Court is not an effective remedy, since it would be bound to fail.

5.2 Counsel also argues that section 70 (1) is discriminatory, since it only operates where a benefit is administered by or on behalf of a Government, and does not apply in relation to a private scheme. It is argued that, if the author had contributed to a private pension fund rather than one administered by the Jersey government, he would not have been adversely affected by section 70. It is therefore contended that the author was discriminated against merely because he contributed to a State-run pension fund, rather than a private one.

5.3 The author further points out that one difficulty is that the New Zealand Government bases itself on the payment received from abroad and only infrequently checks the exchange rate. According to the author, this works to his disadvantage when the value of the New Zealand currency deteriorates against the overseas currency. He submits that the State party should check the exchange rate on the date of every payment of the New Zealand pension and argues that as long as it does not, the operation of section 70 (1) is iniquitous and arbitrary.

5.4 The author further claims that because of the operation of section 70 (1), persons having contributed to overseas pension funds or individuals who happen to have contributed to a State-funded scheme rather than a private scheme overseas are not treated equally. He claims that this discrimination is based on national origin, since it depends on the way a pension scheme operates in a given country whether the benefits so accumulated will be deducted from the New Zealand pension.

Issues and proceedings before the Committee

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The Committee notes that section 70 (1) of the New Zealand Social Security Act applies to all persons receiving benefits pursuant to the Act, that the Act does not distinguish between New Zealand citizens and foreigners and that a deduction takes place in all cases where a beneficiary also receives a similar benefit of the kind characterized in the section from abroad. The Committee finds that the author has failed to substantiate, for purposes of admissibility, that he is a victim of discrimination, and that the author does not, therefore, have a claim under article 2 of the Optional Protocol. The Committee considers that the fact that the State party does not deduct any overseas pension rights, which an individual has privately provided for, equally discloses no claim under article 2 of the Optional Protocol.

7. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under article 2 of the Optional Protocol;

(b) That this decision shall be communicated to the State party, to the author and to his counsel.

[Adopted in English, French and Spanish, the English text being the original version.]

Notes

a/ *Official Records of the General Assembly, Forty-third Session, Supplement No. 40* (A/43/40), annex VIII.B, *P. P. C. v. the Netherlands*, declared inadmissible on 24 March 1988.

b/ Ibid., *Forty-fourth Session, Supplement No. 40* (A/44/40), annex XI.F, *B. d. B. v. the Netherlands*, declared inadmissible on 30 March 1989.

I. Communication No. 476/1991, R. M. v. Trinidad and Tobago (decision adopted on 31 March 1994, fiftieth session)

Submitted by:	R. M. [name deleted] (represented by counsel)
Alleged victim:	The author
State party:	Trinidad and Tobago
Date of communication:	3 October 1991 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 31 March 1994,

Adopts the following:

1. The author of the communication is R. M., a Trinidadian citizen, at the time of submission of the communication awaiting execution at the State prison of Port-of-Spain. He claims to be the victim of a violation by Trinidad and Tobago of article 14, paragraphs 1 and 2, of the International Covenant on Civil and Political Rights. He is represented by counsel.

The facts as submitted by the author

2.1 The author was arrested on 23 August 1982 and charged with the murder, on 19 August 1982, of one C. G. After trial before a jury in the High Court, he was found guilty and sentenced to death on 21 July 1986. The Court of Appeal dismissed his appeal on 16 July 1988. A subsequent petition to the Judicial Committee of the Privy Council was dismissed on 24 April 1991.

2.2 At the trial, it transpired that on 19 August 1982, the author was picked up by C. G. and Sue Y. M., who had been driving around in C. G.'s car, pausing intermittently for drinks. The prosecution relied heavily upon the evidence given by the principal witness, Ms. Sue Y. M. She testified that, at a certain moment, the author and C. G. went to a bar, but she, feeling drunk and tired, stayed behind in the car and fell asleep. When she woke up, the author was driving the car and she heard C. G.'s voice coming from the trunk. The car stopped near a bridge and the author attempted to rape her. C. G. called out from the trunk to the author to "leave the girl alone". The author then got out of the car and opened the trunk. The witness heard sounds of a fight and after that she no longer heard C. G. She then heard a splash from underneath the bridge and when she asked the author upon his return to the car what had happened, he reportedly said: "Don't worry about him, he has gone for a long sleep". According to the witness, the author tried to rape her twice more during that night. In the morning, she reported the incident to the police. Five days later, at an identification parade, she identified the author. The body of the deceased was found in the Caroni river.

2.3 The defence, at the trial and on appeal, claimed that Ms. M.'s testimony was inadmissible because it went beyond the *res gestae*, in that the attempted rapes were not germane to the offence with which the author was charged nor to the issue of identification, and testimony about another serious offence would prejudice the jury against the accused.

2.4 In addition to Ms. M.'s evidence, the prosecution also adduced circumstantial evidence and relied on a confession allegedly made by the author to the police, in which he admitted that he, together with another man, had locked C. G. in the trunk of the car and later had tied his hands and feet and had pushed him into the river. According to the evidence led by the prosecution, this statement was recorded and signed by the author in the presence of a Justice of the Peace.

2.5 During the trial, the author made a statement from the dock, in which he denied any involvement in the crime and claimed that he had not made any confession to the police after his arrest.

The complaint

3. The author claims that he was denied a fair trial in that (a) the judge allowed the prosecution to present Ms. M.'s evidence, which was highly prejudicial to the author, (b) the trial judge failed to instruct the jury on the need of corroboration of this evidence, and (c) the trial judge misdirected the jury, saying that it was improper for the defence to suggest that the author's statement to the police had been fabricated, without subjecting such allegations to cross-examination, thus suggesting that the author's statement from the dock had been improper.

The State party's observations

4.1 The State party, by submission of 1 April 1993, concedes that all criminal appeals available to the author have been exhausted and undertakes not to carry out the death sentence against the author while his communication is under consideration by the Committee.

4.2 In February 1994, the State party informed the Committee that, following the judgement of 2 November 1993 by the Judicial Committee of the Privy Council in Earl Pratt and Ivan Morgan v. the Attorney-General of Jamaica, the author's death sentence had been commuted to life imprisonment.

Issues and proceedings before the Committee

5.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

5.2 The Committee notes that the State party does not object to the admissibility of the communication. Nevertheless, it is the Committee's duty to ascertain whether all the admissibility criteria laid down in the Optional Protocol have been met.

5.3 The Committee notes that the author's allegations that he did not have a fair trial relate to the evaluation of evidence and to the instructions given by the judge to the jury. The Committee refers to its prior jurisprudence and reiterates that it is generally for the appellate courts of States parties to the Covenant to evaluate facts and evidence in a particular case. Similarly, it is not for the Committee to review specific instructions to the jury by the trial judge, unless it can be ascertained that the instructions to the jury were arbitrary or amounted to a denial of justice, or that the judge manifestly violated his obligation of impartiality. The material before the Committee does not show that the trial judge's instructions or the conduct of the trial suffered from such defects. Accordingly, the communication is inadmissible as incompatible with the provisions of the Covenant, pursuant to article 3 of the Optional Protocol.

6. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under article 3 of the Optional Protocol;

(b) That this decision shall be communicated to the State party, to the author and to his counsel.

[Adopted in English, French and Spanish, the English text being the original version.

J. Communication No. 477/1991, J. A. M. B.-R. v. the Netherlands (decision adopted on 7 April 1994, fiftieth session)*

Submitted by:	J. A. M. B.-R. [name deleted] (represented by counsel)
Alleged victim:	The author
State party:	The Netherlands
Date of communication:	22 October 1991

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 7 April 1994,

Adopts the following:

Decision on admissibility

1. The author of the communication is Mrs. J. A. M. B.-R., a citizen of the Netherlands, residing in De Lier, the Netherlands. She claims to be a victim of a violation by the Netherlands of article 26 of the International Covenant on Civil and Political Rights. She is represented by counsel.

The facts as submitted by the author

2.1 The author, who is married, was employed as a schoolteacher from August 1982 to August 1983. As of 1 August 1983, she was unemployed. She claimed, and received, unemployment benefits by virtue of the Unemployment Act. Pursuant to the provisions of that Act, the benefits were granted for a maximum period of six months, that is, until 1 February 1984. The author subsequently found new employment as of 18 August 1985.

2.2 Having received benefits under the Unemployment Act for the maximum period ending on 1 February 1984, the author contends that she was entitled, thereafter, to a benefit under the then Unemployment Provision Act, for a period of up to two years. Those benefits would have amounted to 75 per cent of the last salary, whereas the benefits under the Unemployment Act amounted to 80 per cent of the last salary.

2.3 On 1 April 1985, the author applied for benefits under the Unemployment Benefits Act; her application was, however, rejected by the Municipality of De Lier on 23 May 1985, on the grounds that as a married woman who did not qualify as a breadwinner, she did not meet the requirements of the Act. The rejection was based on article 13, paragraph 1, subsection 1, of the Unemployment Benefits Act, which did not apply to married men.

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* The text of an individual opinion submitted by Mr. B. Wennergren is appended.

2.4 On 26 February 1987, the municipality confirmed its earlier decision. On 26 April 1989, however, it partly revoked its decision and granted the author benefits under the Unemployment Benefits Act for the period from 23 December 1984 to 18 August 1985. It still refused benefits for the period from 1 February to 23 December 1984 (see para. 2.5 below). The author appealed the decision to the Board of Appeal at The Hague, which, on 15 November 1989, declared her appeal unfounded. The author subsequently appealed to the Central Board of Appeal, which, by judgement of 5 July 1991, confirmed the Board of Appeal's decision.

2.5 In its judgement of 5 July 1991, the Central Board of Appeal refers to its judgement of 10 May 1989 in the case of Mrs. Cavalcanti Araujo-Jongen, a/ in which it noted that article 26 in conjunction with article 2 of the International Covenant on Civil and Political Rights applies also to the granting of social security benefits and similar entitlements. The Central Board further observed that the explicit exclusion of married women, unless they met specific requirements that are not applicable to married men, implied direct discrimination on the ground of sex in relation to marital status. The Central Board, having made reference to article 26 of the Covenant, indicated that it was to have direct applicability as of 23 December 1984.

2.6 On 24 April 1985, the State party abolished the requirement of article 13, paragraph 1, subsection 1, limiting the retroactive effect, however, to persons who had become unemployed on or after 23 December 1984. In 1991, further amendments to the Unemployment Benefits Act resulted in the abolition of this limitation, as a consequence of which women can claim benefits also when they became unemployed before 23 December 1984, provided they satisfy the other requirements of the Act. One of the other requirements is that the applicant must be unemployed on the date of application.

The complaint

3.1 In the author's opinion, the denial of benefits under the Unemployment Benefits Act amounts to discrimination within the meaning of article 26 of the Covenant. In this context, she refers to the Committee's views in respect of communications No. 172/1984 (Broeks v. the Netherlands) and No. 182/1984 (Zwaan-de Vries v. the Netherlands).

3.2 The author notes that the Covenant entered into force for the Netherlands on 11 March 1979, and that, accordingly, article 26 was directly applicable as of that date. She contends that the date of 23 December 1984 was chosen arbitrarily, as there is no formal link between the Covenant and the Third Directive of the European Community. The Central Board had not, in earlier judgements, taken a consistent view with regard to the direct applicability of article 26. In a case relating to the General Disablement Act, for instance, the Central Board decided that article 26 could not be denied direct applicability after 1 January 1980.

3.3 The author submits that the Netherlands had, upon ratifying the Covenant, accepted the direct applicability of its provisions, in accordance with articles 93 and 94 of the Constitution. She further argues that even if the possibility of gradual elimination of discrimination were permissible under the Covenant, the transitional period of almost 13 years between the adoption of the Covenant in 1966 and its entry into force for the Netherlands in 1979 was sufficient to enable it to adapt its legislation accordingly.

3.4 The author contends that the changes recently introduced in the legislation do not provide her with a remedy for the discrimination suffered under article 13, paragraph 1, subsection 1, of the old law. In this context, she points out that, although she applied for benefits while she was still unemployed, the new law still does not entitle her to benefits for the period of 1 February to 23 December 1984. According to the current interpretation of the law, based on the jurisprudence of the Central Board of Appeal, benefits under the Unemployment Benefits Act can be granted to women who had a claim originating in unemployment that began before 23 December 1984, but these benefits can only be granted as from 23 December 1984. For the unemployment period before that date, benefits are still not being granted. In a memorandum from the Deputy Minister of Social Affairs dated 14 May 1990, in which the proposed amendments to the Act were explained, it is clearly stated that the starting date of the benefits is either 23 December 1984 or a later date.

3.5 The author claims that she suffered financial damage as a result of the application of the discriminatory provisions of the Unemployment Benefits Act, in the sense that benefits were denied to her for the period from 1 February to 23 December 1984. She requests the Human Rights Committee to find that article 26 acquired direct effect as from the date on which the Covenant entered into force for the Netherlands, namely, 11 March 1979, and that the denial of benefits on the basis of article 13, paragraph 1, subsection 1, of the Act is discriminatory within the meaning of article 26 of the Covenant. She claims that benefits under the Unemployment Benefits Act should be granted to women on an equal footing with men as of 11 March 1979, and in her case as of 1 February 1984.

The State party's observations

4. By submission of 18 February 1993, the State party confirms that the author has exhausted domestic remedies and states that it is not aware of any other obstacles to admissibility of the communication.

Issues and proceedings before the Committee

5.1 Before considering any claim contained in a communication, the Human Rights Committee must decide, in accordance with rule 87 of its rules of procedure, whether or not it is admissible under the Optional Protocol to the Covenant.

5.2 The Committee notes that the State party does not object to the admissibility of the communication. Nevertheless, it is the Committee's duty to ascertain whether all the admissibility criteria laid down in the Optional Protocol have been met.

5.3 The Committee notes that the author contends that she is entitled without discrimination to benefits for the period of 1 February to 23 December 1984 and that the amendments in the law do not provide her with a remedy. The Committee notes that the author applied for benefits under the Unemployment Benefits Act on 1 April 1985, and that benefits were granted retroactively as from 23 December 1984. With reference to its constant jurisprudence, [b] the Committee recalls that, while article 26 requires that discrimination be prohibited by law and that all persons be guaranteed equal protection against discrimination, it does not concern itself with which matters may be regulated by law. Thus, article 26 does not of itself require States parties either to provide social security benefits or to provide them retroactively, in respect of the date of application. However, when such benefits are regulated by law, then such a law must comply with article 26 of the Covenant.

5.4 The Committee notes that the law in question grants to men and women alike benefits as from the day of application, unless there are sufficient reasons to grant benefits as from an earlier date. The Committee also notes the view expressed by the Central Board of Appeal that benefits for those women who did not qualify for benefits under the old law should be granted retroactively as from 23 December 1984 but not earlier. The author has failed to substantiate, for purposes of admissibility, that these provisions were not equally applied to her, in particular that men who belatedly apply are granted wider retroactive benefits, as from the date in which they have become eligible for benefits, whereas she, as a woman, was denied such benefits. Accordingly, the Committee finds that the author has failed to substantiate her claim under article 2 of the Optional Protocol in this regard.

5.5 As regards the author's claim that the discriminatory nature of the law from 1 February to 23 December 1984, and the application of the law at that time, made her a victim of a violation of the right to equality before the law, the Committee notes that the author, in the period between 1 February and 23 December 1984, did not apply for benefits under the Unemployment Benefits Act. Therefore, she cannot claim to be a victim of a violation of article 26 by the application of the law in force during that period, even if the law in question were found to be discriminatory in respect of some of those applying under it. This aspect of the communication is thus inadmissible under article 1 of the Optional Protocol.

5.6 As to the issue raised by the author whether article 26 of the Covenant acquired direct effect in the Netherlands as from 11 March 1979, the date on which the Covenant entered into force for the State party, or in any event as from 1 February 1984, the Committee notes that the Covenant applies for the Netherlands as from its date of entry into force. The question of whether the Covenant can be invoked directly before the Courts of the Netherlands is however a matter of domestic law. This part of the communication is therefore inadmissible under article 3 of the Optional Protocol.

6. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under articles 1, 2 and 3 of the Optional Protocol;

(b) That this decision shall be communicated to the State party, to the author and to her counsel.

[Adopted in English, French and Spanish, the English text being the original version.]

Notes

a/ Mrs. Cavalcanti's communication to the Human Rights Committee was registered as No. 418/1990; views were adopted on 22 October 1993 (see annex IX.Q above).

b/ See inter alia the Committee's views with regard to communications No. 172/1984 (Broeks v. the Netherlands) and No. 182/1984 (Zwaan-de Vries v. the Netherlands), adopted on 9 April 1987, (Official Records of the General Assembly, Forty-second Session, Supplement No. 40, (A/42/40), annexes VIII.B and D) and communication No. 415/1990 (Pauger v. Austria), adopted on 26 March 1992 (ibid., forty-seventh Session, Supplement No. 40 (A/47/40), annex IX.R).

Appendix

Individual opinion submitted by Mr. Bertil Wennergren under rule 92, paragraph 3, of the rules of procedure of the Human Rights Committee, concerning communication No. 477/1991 (J. A. M. B.-R. v. the Netherlands)

I do not agree with the Committee's decision to declare this communication inadmissible under articles 1, 2 and 3 of the Optional Protocol. In my view, it should have been declared admissible, as it may raise issues under article 26 of the Covenant. My reasons are set out hereunder.

1. The communication must be compared with communication No. 182/1984 (F.H. Zwaan-de Vries v. the Netherlands), views adopted on 9 April 1987, communication No. 418/1990 (C. H. J. Cavalcanti Araujo-Jongen v. the Netherlands), views adopted on 22 October 1993 and communication No. 478/1991 (A. P. L.-v. d. M. v. the Netherlands), declared inadmissible on 26 July 1993.

2. The relevant facts in this case are laid out in paragraphs 2.1 to 2.3 of the Committee's decision. They are essentially the same as the facts in the Zwaan-de Vries case. There is, however, one difference. Mrs. Zwaan-de Vries applied for continued support on the basis of the Unemployment Benefits Act, once the payment of her unemployment benefits under the Unemployment Benefits Act were terminated on 10 October 1979. On the other hand, Mrs. B.-R., whose benefits under the Unemployment Benefits Act expired on 1 February 1984, did not apply for benefits under the Unemployment Benefits Act until 1 April 1985; at that time, she was still unemployed.

3. It should be noted that the Council of the European Communities had, on 19 December 1978, adopted a directive on the progressive implementation of the principle of equal treatment of men and women in the field of social security (79/7/EEC), giving member States a deadline of 23 December 1984 to make such amendments to their legislation as might be necessary in order to bring it into line with the directive. The Netherlands, thus, on 29 April 1985, amended section 13, paragraph 1, subsection 1, of the Unemployment Benefits Act to comply with the directive. Under the amendment, section 13, paragraph 1, subsection 1, was deleted, with the result that it became possible for married women, who were not breadwinners, to apply for benefits under the Unemployment Benefits Act.

4. In its views in Zwaan-de Vries, the Committee observed that what was at issue was not whether or not social security benefits should be progressively established in the Netherlands, but whether the legislation providing for social security violated the prohibition of discrimination in article 26 of the Covenant, and its guarantee, to all persons, of equal and effective protection against discrimination. The Committee explained that, when legislation providing for social security is adopted in the exercise of a State's sovereign power, such legislation must comply with article 26 of the Covenant. The Committee then found that the differentiation in section 13, paragraph 1, subsection 1, of the Unemployment Benefits Act, which placed married women at a disadvantage compared with married men, was unreasonable, and that this fact appeared to have been conceded by the State party itself through enactment of the legislative amendment of 29 April 1985, with retroactive effect to 23 December 1984. The situation in which Mrs. Zwaan-de Vries found herself at the material time, and the application to her of the then applicable Dutch law, made her a victim of a violation, based on sex, of article 26 of the Covenant,

because she was denied social security benefits on an equal footing with men. Although the State party had taken the necessary measures to put an end to this discrimination suffered by the author, the Committee was of the view that the State party should offer Mrs. Zwaan-de Vries an appropriate remedy.

5. In its views in the *Cavalcanti* case, the Committee considered whether the amended Unemployment Benefits Act continued to indirectly discriminate against the author, because it required applicants to be unemployed at the time of application, a requirement which effectively barred her from retroactive access to benefits. The Committee, however, deemed this requirement to be reasonable and objective and found that the facts before it did not reveal a violation of article 26 of the Covenant. With regard to the case of L.-v. d. M. (No. 478/1991), the Committee noted that the requirement of being unemployed at the time of application for benefits under the Unemployment Benefits Act applied to men and women alike and declared the communication inadmissible.

6. As Mrs. B.-R. was unemployed when she applied for benefits under the Unemployment Benefits Act, she did comply with the requirements that had stood in the way in the two cases that I have just discussed. However, as she made her application not immediately upon expiry of her benefits under the Unemployment Benefits Act but some 14 months later, her application was made not only with respect to future but also past benefits. The Central Board of Appeal did not pay particular attention to this point in its decision of 5 July 1991; instead, it concentrated on whether article 26 was directly applicable. The Board found that article 26 of the Covenant could not be denied direct applicability after 23 December 1984, the time-limit established by the Third Directive of the European Community on the elimination of discrimination between men and women within the Community. In its views in the *Cavalcanti* case (para. 7.5), the Committee expressly stated that the determination of whether and when article 26 acquired direct effect in the Netherlands is a matter of domestic law and does not come within the competence of the Committee. The Committee instead had to consider, as was made clear in the *Zwaan-de Vries* case, whether domestic legislation violated the prohibition of discrimination in article 26 of the Covenant. In this context, I find it difficult to see any relevant difference between the *Zwaan-de Vries* case and the present case. What is at issue in the present case is, more precisely, whether domestic law made Mrs. B.-R. a victim of a violation, based on sex, of article 26 of the Covenant in her situation at the material time, that is, between 1 February 1984 and 1 April 1985. This matter, which must be considered independently of the Directive of the European Community and the deadline set by it, may, in my view, as did the similar matter in the case of *Zwaan-de Vries*, raise issues under article 26 of the Covenant, as well as issues about the appropriate remedy. It cannot be assumed as a matter of course that a retroactive granting of benefits as of 23 December 1984 is an appropriate remedy.

7. If the Central Board of Appeal provided the author with benefits from 23 December 1984, which I have presumed it did, different wording should have been chosen to imply that the fact that the law subsequently limited retroactivity to 23 December 1984, did not concern the present case, as the judgement here was based on the Third Directive of the European Community and its deadline, and not on the law as amended. I then would like to state that it is for the Committee to consider whether such a limitation of a State party's

obligation under article 26 of the Covenant, in relation to the application of a law, complies with this provision.

[Done in English, French and Spanish, the English text being the original version.]

K. Communication No. 487/1992, Walter Rodríguez Veiga v. Uruguay (decision adopted on 18 July 1994, fifty-first session)

Submitted by: Walter Rodríguez Veiga

Alleged victim: The author

State party: Uruguay

Date of communication: 14 September 1991 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 18 July 1994,

Adopts the following:

Decision on admissibility

1. The author of the communication is Walter Rodríguez Veiga, an Uruguayan citizen currently residing in Montevideo. He claims to be a victim of violations of his human rights by Uruguay, but he does not invoke any of the provisions of the International Covenant on Civil and Political Rights.

The facts as submitted by the author

2.1 The author is a civil servant. He was formerly employed by the Ministry of Education. During the period of military rule in Uruguay (that is, from 1973 to 1985), he was dismissed from his post and stripped of all his functions, allegedly on purely arbitrary grounds. Together with some colleagues who found themselves in a similar position, he instituted judicial proceedings requesting his reinstatement as early as the year 1977.

2.2 After the country's transition to democratic rule on 7 November 1985, he obtained a favourable judgement (Sentencia No. 17) from a local tribunal in Montevideo, which ordered the defendants - the Ministry of Education and the State University - to compensate the author for all the material and moral prejudice that he had suffered. Subsequently, he was reintegrated into the civil service. By an interlocutory judgement of 31 July 1987 handed down by an administrative tribunal (Juzgado de Primera Instancia en lo Contencioso Administrativo), accrued interests on the compensation due to the author were computed at an annual rate of 12.3 per cent.

2.3 The author complains that in spite of the above judicial decisions, the authorities have failed to execute fully their terms. Although the Executive Branch did, in principle, acknowledge its obligations *vis-à-vis* the author as early as 1989, it has, according to Mr. Veiga, adopted deliberately dilatory tactics designed to prevent the payment of full and inflation-adjusted compensation.

2.4 After the election of President Luis Lacalle in 1990, the author submitted his file to the President's office; his case was then registered as file No. 87/91 before the Uruguayan General Accounting Office (Contaduría de la Nación), where it apparently remains pending. The author suspects that no follow-up will be given by this office, either. Nor have the author's numerous other, administrative demarches, recorded in another file (No. MEF/89/01/8501), been successful.

2.5 The author requests the intercession of the Human Rights Committee, with a view to obliging the Uruguayan authorities to execute the judgement of 1985 in his favour.

The complaint

3.1 Although the author does not invoke the provisions of the International Covenant on Civil and Political Rights, it transpires that he claims that he is being denied an effective remedy, and that he is unlawfully denied full compensation awarded to him by decision of a court of law. It therefore appears that he claims a violation by Uruguay of article 2, paragraph 3, of the Covenant.

The State party's information and observations and the author's comments thereon

4.1 In its submission under rule 91 of the rules of procedure, the State party indicates that by decision of the Ministry of Economics and Finance dated 5 February 1992, a specified sum was transferred to the State University, with a view to paying the author the compensation due him, together with inflation adjustments and interest, so as to comply with the terms of the decision of the administrative tribunal of 31 July 1987.

4.2 Under the terms of the decision of 5 February 1992, a sum of 111,934,098 new pesos should have been paid to the author, but the payment only covered the period until 7 December 1989. This date, it appears, was not chosen arbitrarily but in accordance with article 686 of Law No. 16,170 of 28 December 1990.

5.1 In his comments, the author takes issue with the State party's observations. He notes that the sum mentioned in the resolution of 5 February 1992, which was supposed to cover the period until December 1989, was only paid in April 1992, and in the months between December 1989 and April 1992, inflation had been in the order of 230 per cent, which meant that the monetary value of the compensatory payment had been severely diminished in real terms. The author complains that the State party's authorities deliberately delayed the payment of his compensation and that they deliberately disregarded the terms of the interlocutory judgement of 31 July 1987.

Issues and proceedings before the Committee

6.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 Although the author has not alleged that the State party has violated any particular provisions of the Covenant, the Committee has ex officio examined whether the facts as submitted might raise potential issues under any provision of the Covenant, in particular under article 25 in conjunction with article 2, paragraph 3. It concludes that they do not, given that the author was reintegrated into the civil service and that he was granted compensation for the prejudice he had suffered. The violation of article 25 has therefore been remedied. The Committee accordingly concludes that the author has no claim under article 2 of the Optional Protocol, and that the communication is inadmissible.

7. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible;

(b) That this decision shall be communicated to the State party and to the author of the communication.

[Adopted in English, French and Spanish, the English text being the original version.]

L. Communication No. 489/1992, Peter Bradshaw v. Barbados (decision adopted on 19 July 1994, fifty-first session)

Submitted by:	Peter Bradshaw (represented by counsel)
Alleged victim:	The author
State party:	Barbados
Date of communication:	10 February 1992 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 19 July 1994,

Adopts the following:

Decision on admissibility

1. The author of the communication is Peter Bradshaw, a Barbadian citizen currently awaiting execution at Glendairy Prison, Barbados. He claims to be a victim of violations by Barbados of articles 6, 7, 10 and 14, paragraph 3 (c), of the International Covenant on Civil and Political Rights. He is represented by counsel.

The facts as submitted by the author

2.1 The author and his co-defendant were arrested on 23 January 1985 and charged four days later with the murder of one C. S. On 8 November 1985, both were convicted and sentenced to death in the Bridgetown Assizes Court. On 20 November 1985, the author appealed to the Court of Appeal of Barbados, which dismissed the appeal on 31 May 1988. He then sought leave to appeal to the Judicial Committee of the Privy Council. Counsel in London, however, advised that there was no merit in presenting the case to the Judicial Committee.

2.2 C. S. was killed during a robbery at his home on 14 December 1984; his invalid wife was upstairs in their bedroom. She heard gunshots, and immediately afterwards three masked men came upstairs to demand her money and jewellery. Because of the masks, she was unable to identify the men. There were no other witnesses to the crime.

2.3 The author and his co-defendant were arrested in connection with other offences. After his arrest, the author allegedly confessed to one of the investigating officers that he had killed C. S., stating that the gun was discharged accidentally, and indicated the hiding place of the murder weapon and the jewellery. The only other evidence against him were fingerprints said to be his, which were allegedly discovered in the home of the deceased.

2.4 As to the circumstances of his apprehension, the author states that after his arrest in the early morning of 23 January 1985, he was taken to Oistins Police Station. He claims that he was taken to a room where his hands were tied behind his head and he was blindfolded, and placed on his back on a table. Police officers then beat him in his stomach. When he started to shout, he allegedly was brought to another room. There he was placed on the floor; police officers held his hands and feet and he was again beaten. When he screamed he was gagged. Shortly thereafter, a cup of water was thrown on the floor. He was then thrown into the puddle of water, lying on his stomach, was stripped from the waist down and water was poured over his buttocks. One of the officers plugged a wire into the wall and he was given electric shocks and was beaten. This went on for about 30 minutes. He was continuously questioned and was not allowed to sleep for three days. He was only given something to eat in the night of 26 January 1985. He further claims that he was beaten on 24 January, that an officer fired a shot next to his head and that he was again administered electric shocks on 25 January 1985. Finally, on 27 January 1985, he signed the confession statement; he was then charged with murder and the next day brought before an examining magistrate.

2.5 The issue of ill-treatment of the accused was raised during the trial. In the author's case, the author's version was corroborated by evidence given in cross-examination by the doctor who had examined the author on 27 January 1985. He stated that the abrasions on the author's body could well have been caused by beatings and electric shocks. The police, however, indicated that both accused were very cooperative during the investigations, that they both made a free and voluntary statement on 24 January 1985 and that the author slipped and fell on his back while he was pointing out the hiding place of the weapon and booty. The statements of the accused were admitted in evidence after a voir dire.

2.6 The author was found guilty of murder under the rule of constructive malice, that is, malice which is not shown by direct proof of an intention to cause injury, but which is inferentially established by the necessarily injurious results of the acts shown to have been committed. The judge, in his summing up, instructed the jury as follows: "You may return a verdict of guilty ... if the evidence makes you feel sure that: (1) Peter Bradshaw was a party with others in an agreed plan to steal ... and for the use of a gun if it became necessary in the execution of the plan; (2) C. S. died as a consequence of violence used in the execution of the plan; and (3) that Peter Bradshaw was present and participated in the execution of the agreed plan when C. S. received the violence from which he died. If the evidence makes you feel sure as to these things, it is immaterial that the violence was inflicted inadvertently or unintentionally".

2.7 On 23 May 1992, a warrant was read out to the author for his execution on 25 May 1992. Counsel immediately filed a constitutional motion on the author's behalf, and a stay of execution was granted on 24 May 1992. On 29 September 1992, the court of first instance dismissed the constitutional motion; a/ the author's appeal against the decision of the court of first instance was dismissed by the Court of Appeal of Barbados on 2 April 1993. A petition for leave to appeal against the dismissal of the constitutional motion by the courts of Barbados is currently pending before the Judicial Committee of the Privy Council.

2.8 The appeal against the dismissal of the constitutional motion in the author's case was based on the following grounds:

(a) The constructive malice rule in murder, and sections 2 and 3 of chapter 141 of the Offences against the Person Act (which deals with the death sentence being mandatory in murder cases), are incompatible with the Constitution of Barbados;

(b) Whether the author has a right to the exercise of the prerogative of mercy by the Governor-General, in particular in view of the delay in the execution of the sentence of death;

(c) Commutation of the death sentence would be an appropriate remedy for the violations suffered by the author during the course of the police investigations, namely, beatings by the police, denial of access to counsel and detention by the police for an unnecessarily long period before being taken before a court;

(d) The delay in the execution of the death sentence amounts to inhuman or degrading punishment or other treatment, in violation of the Barbados Constitution and article 7 of the International Covenant on Civil and Political Rights;

(e) The provisions of the Covenant and of the Optional Protocol thereto are self-executing and should therefore be directly enforceable by individuals; the court should recognize that the author has the legal right to place his case before the Human Rights Committee pursuant to the Optional Protocol and to have the Committee's views put to the Government of Barbados, and/or, alternatively, the author has a legitimate expectation, based on the State party's accession to the Covenant and the Optional Protocol, that the sentence of death will not be carried out before the Committee has given a final decision in the case.

2.9 When considering ground (a), the Court of Appeal referred, inter alia, to article 6, paragraph 2, of the International Covenant on Civil and Political Rights and to article 4, paragraph 2, of the American Convention on Human Rights. It noted that since Barbados has not abolished the death penalty, the imposition of the death sentence for the most serious crimes is not in violation with these provisions, and that the question of what constitutes a "most serious crime" for the purpose of those provisions obviously has to be determined in Barbados and nowhere else. With respect to ground (e), the Court of Appeal observed that since Barbados had not enacted legislation to fulfil its treaty obligations under the Covenant and the Optional Protocol, the provisions enabling written representations to the Human Rights Committee, and the procedural and other provisions thereunder, are not part of the law of Barbados. It concluded that: "after a sentence of death is imposed and legal procedures are concluded and legal rights are at an end, the condemned man may seek extra-legal relief from the Governor-General ... He can additionally make written representations for leniency to the Human Rights Committee established by the International Covenant, but that, on the state of the law, is not a matter with respect to which this court can adjudicate".

2.10 In respect of the argument that the author has a legitimate expectation that the State would not carry out the sentence of death before his rights under the Covenant and Optional Protocol have been considered by the Committee, the Court of Appeal stated that "this argument fails because all the legal appellate procedures are exhausted, the sentence of death remains in effect, and the only avenue now open is extra-legal and extra-judicial" (meaning the prerogative of mercy by the Governor-General).

The complaint

3.1 As to the author's trial, counsel concedes that the judge's directions to the jury were in conformity with the applicable law in Barbados. He argues, however, that in other common law countries, the law of constructive malice has been abolished, and that under the current common law system it does not suffice to establish murder if the killing was caused inadvertently, as in the author's case. It is submitted that by failing to either repeal or amend the law as it relates to constructive malice, or by failing to distinguish between murder with malice aforethought and unintentional killing during commission of a crime involving the use of violence, the imposition of the death penalty violates article 6 of the Covenant, under which it should only be imposed for the "most serious crimes".

3.2 Counsel notes that the author has been detained on death row for over eight years. He has filed a request for pardon to the Governor-General of Barbados, but has not been informed if or when his request will be considered. The inherent uncertainty of the author's position as a person under sentence of death, prolonged by the delays in the judicial proceedings, are said to cause severe mental stress, which amounts to cruel, inhuman and degrading punishment in violation of article 7 of the Covenant.

3.3 The treatment of the author referred to in paragraph 2.4 above is said to amount to violations of articles 7 and 10 of the Covenant.

3.4 Counsel points out that the author filed his notice of appeal on 20 November 1985 but that the decision by the Court of Appeal was not given until 31 May 1988. This was the result of the delay by the Registrar's Office in preparing the Record of Appeal. Counsel further claims that it took a considerable time before the authorities replied to his persistent requests for retainer's fees to file a petition for special leave to appeal to the Judicial Committee of the Privy Council. b/ It is submitted that domestic remedies in respect of the criminal proceedings against the author have been unreasonably prolonged, in violation of article 14, paragraph 3 (c).

The State party's information and observations

4.1 By a letter dated 1 July 1992, the State party notes that the Privy Council in Barbados, which was established under section 76 of the Constitution of Barbados to advise the Governor-General on the exercise of the prerogative of mercy, reviewed the author's case but did not recommend that the death sentence be commuted.

4.2 The State party further notes that, accordingly, all domestic remedies have been exhausted and that the death sentence stands. It states that the author's execution will not take place before the constitutional motion in his case (which at the time of the State party's submission was pending before the court of first instance) has been heard. No reference is made to the Special Rapporteur's request for interim measures of protection under rule 86 of the Committee's rules of procedure. Since July 1992 no further information has been received from the State party in respect of the author's constitutional motion.

Issues and proceedings before the Committee

5.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

5.2 The Committee notes that the issues raised by the author in his communication are related to the grounds of appeal raised in his constitutional motion. It further notes that a petition for leave to appeal against the dismissal of the constitutional motion by the Court of Appeal of Barbados remains pending before the Judicial Committee of the Privy Council. In this respect, therefore, the author has not exhausted all available domestic remedies, as required by article 5, paragraph 2 (b), of the Optional Protocol.

5.3 The Committee expresses concern that the State party had issued a warrant for the author's execution on 23 May 1992, in spite of the request of the Special Rapporteur on New Communications not to carry out the death sentence against Mr. Bradshaw while his communication was under consideration by the Committee. This was transmitted to the State party on 6 May 1992. Furthermore, the Committee notes with concern the findings of the Court of Appeal of Barbados in respect of the author's constitutional motion, referred to in paragraphs 2.9 and 2.10 above. By ratifying the Covenant and the Optional Protocol, Barbados has undertaken to fulfil its obligations thereunder and has recognized the Committee's competence to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by the State party of any of the rights set forth in the Covenant. While the Covenant is not part of the domestic law of Barbados which can be applied directly by the courts, the State party has nevertheless accepted the legal obligation to make the provisions of the Covenant effective. To this extent, it is an obligation for the State party to adopt appropriate measures to give legal effect to the views of the Committee as to the interpretation and application of the Covenant in particular cases arising under the Optional Protocol. This includes the Committee's views under rule 86 of the rules of procedure on the desirability of interim measures of protection to avoid irreparable damage to the victim of the alleged violation.

6. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under article 5, paragraph 2 (b), of the Optional Protocol;

(b) That, since this decision may be reviewed under rule 92, paragraph 2, of the Committee's rules of procedure upon receipt of a written request by or on behalf of the author containing information to the effect that the reasons for inadmissibility no longer apply, the State party shall be requested, taking into account the spirit and purpose of rule 86 of the Committee's rules of procedure, not to carry out the death sentence against the author before he has had a reasonable time, after completing the effective domestic remedies available to him, to request the Committee to review the present decision;

(c) That this decision shall be transmitted to the State party and to the author's counsel.

[Adopted in English, French and Spanish, the English text being the original version.]

Notes

a/ The author's constitutional motion and the constitutional motion of D. R. (see annex X.P below, communication No. 504/1992, decision on admissibility adopted on 19 July 1994, at the Committee's fifty-first session) were consolidated by agreement.

b/ Eventually, counsel decided, upon advice of leading counsel in London, that the appeal to the Judicial Committee of the Privy Council ought not to be pursued.

M. Communication No. 497/1992, Odia Amisi v. Zaire (decision adopted on 19 July 1994, fifty-first session)

Submitted by:	Odia Amisi
Alleged victim:	The author
State party:	Zaire
Date of communication:	11 July 1991

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 19 July 1994,

Adopts the following:

Decision on admissibility

1. The author of the communication is Odia Amisi, a Zairian citizen, born on 4 March 1953, currently residing in Bujumbura, Burundi. He claims to be a victim of violations by Zaire of articles 14, paragraphs 1 and 5, and 26 of the International Covenant on Civil and Political Rights.

The facts as submitted by the author

2.1 Since 1979, the author has been employed as a teacher at the school for children of Zairian diplomats at Bujumbura, Burundi. On 28 April 1988, he was suspended from his duties by decision of the then Zairian ambassador to Burundi and regional chairman of the Government's Movement for the Revolution (*Mouvement pour la Révolution* (MPR)). This was allegedly attributable to the publication, in the journal *Jeune Afrique*, of an article criticizing the non-payment of salaries for the personnel of the Zairian Embassy in Burundi; the author observes that he had nothing to do with this article, which was signed K. K., Bujumbura, Burundi. He also refers to the written confirmation from the Chief Editor of *Jeune Afrique* in Paris, S.A., that he did not write this article.

2.2 The author contends that because he was responsible for the situation in his embassy, the ambassador felt humiliated by the article and looked for a scapegoat. Mr. Amisi claims that the ambassador arbitrarily turned on him, by calling him a "subversive element".

2.3 Since his suspension, the author has complained to the competent authorities about his situation, maintaining his innocence, and has unsuccessfully sought reinstatement in his post, payment of salary arrears and compensation by way of damages. He did not receive any reply to his letters. The only result was a promise to intercede on his behalf, made by the Zairian ambassador to Zambia. His intercession, however, produced no result. Instead, the author learned that some administrative decisions had been taken against some members of the staff of the school, allegedly in the interest of the school management. Among those affected was the author, who was said to have "deserted" his post.

2.4 The author indicates that on 8 December 1990, he submitted a communication to the secretariat of the Organization of African Unity, which took no action on his case. Therefore, the author affirms to have exhausted all available domestic remedies.

The complaint

3.1 The author seeks reinstatement in his former post and payment of the outstanding salaries and damages for the violations of his rights.

3.2 It is submitted that the decision to dismiss the author was discriminatory and arbitrary. The author believes that he is the victim of a "political plot". He further alleges that the decision to dismiss him was illegal, as it was not in conformity with the disciplinary action procedures that may lead to the suspension of government employees; this apparently is considered to violate his rights under article 14.

Issues and proceedings before the Committee

4.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

4.2 At its forty-eighth session, in July 1993, the Committee considered the author's complaint and requested him to provide clarifications about steps taken to exhaust domestic remedies before Zairian tribunals. A detailed request for clarifications was sent, accordingly, on 3 August 1993; there has been no reply from the author.

4.3 The Committee has further considered the material placed before it by the author. As to his claims that the decision of the administrative authorities to dismiss him constituted discrimination prohibited under article 26 and that he was denied a fair hearing under article 14 of the Covenant, the Committee finds that these allegations have not been substantiated, for purposes of admissibility; therefore, the author has failed to advance a claim within the meaning of article 2 of the Optional Protocol.

5. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible;

(b) That this decision shall be communicated to the author of the communication and, for information, to the State party.

[Adopted in English, French and Spanish, the English text being the original version.]

N. Communication No. 498/1992, Zdenek Drbal v. the Czech Republic (decision adopted on 22 July 1994, fifty-first session)*

Submitted by:	Zdenek Drbal
Alleged victim:	The author
State party:	The Czech Republic
Date of communication:	30 August 1991 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 22 July 1994,

Adopts the following:

Decision on admissibility

1. The author of the communication (dated 30 August 1991) is Zdenek Drbal, a Czech citizen, currently residing in Brno, Czech Republic. He submits the communication on his own behalf and that of his daughter Jitka. He claims that they are victims of a violation by the Czech Republic of their human rights. [a]

The facts as submitted by the author

2.1 The author shared a household with his daughter, who was born on 6 March 1983, and with her mother until 1985. He and the child then left the common household, because of the aggressive behaviour allegedly displayed by the mother, and started living with the author's parents. The mother subsequently was hospitalized in a psychiatric institution; the child received treatment as an out-patient, according to the author, to overcome the effects of the maltreatment she had been subjected to by her mother.

2.2 The author, on 23 May 1985, asked the Brno-venkov District Court to grant him custody of the child. The doctor who had been treating the child gave evidence on the father's behalf; another expert gave evidence on behalf of the mother. On 8 September 1986 the Brno-venkov District Court decided to give custody to the mother. The father continued to live with the child and appealed to the Brno Regional Court, which on 11 March 1987 confirmed the judgement. On 16 March 1987, the author addressed a complaint to the General Prosecutor's Office; the Office informed him on 17 December 1987 that it would not submit his case to the Supreme Court, as it considered the judgement and the procedures to be consistent with the law. The author thus claims to have exhausted domestic remedies, as only the General Prosecutor can bring a case before the Supreme Court.

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* The text of an individual opinion, submitted by Mr. Bertil Wennergren, is appended.

2.3 The author continued to keep the child with him because, according to him, the mother is still mentally ill and aggressive and does not show any interest in the child. He claims that she does not contribute financially to the child's maintenance, never comes to visit and that she is incapable of taking care of the child.

2.4 On 13 July 1988, the police came to the author's apartment, where he was living with his child and his parents. They were accompanied by a judge of the Brno-venkov District Court, the mother of the child and her legal adviser. However, their attempt to take the child away by force failed. The author subsequently submitted a complaint to the Federal Assembly's Office, which referred his complaint to the General Prosecutor's Office on 20 October 1988. On 8 December 1988, the Office informed him that the attempted execution of the Court's decision had been lawful.

2.5 The author submits that he further addressed letters to the President of the Supreme Court and to the Office of the President of Czechoslovakia, all to no avail.

2.6 He further submits that on 11 October 1988, the Brno-venkov District Council initiated legal action against him for preventing the execution of the Court's order. No prosecution followed, however, because of a general amnesty declared on 28 October 1988.

2.7 On 16 May 1988, the author requested the Brno-venkov District Court to change the child's place of residence officially. As the District Court considered itself biased, his request was heard by the Brno Town Court, which rejected it on 24 June 1991. Subsequently, the author addressed letters to the General Prosecutor and to the President of the Supreme Court, to no avail.

2.8 The author stresses that although the child is living with him, he has no legal custody rights, and the Court's judgement, giving custody to the mother, can still be executed. He submits that he lives in constant fear that the child will be taken away from him.

The complaint

3.1 Although the author does not invoke any specific article of the Covenant, it appears that he claims that he and his daughter are victims of a violation by the Czech Republic of articles 14, paragraph 1; 23, paragraph 1; and 24, paragraph 1.

3.2 The author contends that his ex-wife's father indicated, in 1985, that he had friends in the Brno Court and that he would make sure that the custody proceedings would turn against the author. He claims that the chairman of the Brno-venkov District Court was biased against him and that the testimony of one of the experts, stating that the mother was capable of taking care of the child, was false. He alleges that there was a conspiracy against him to take the child from him. The chairman of the Brno Regional Court allegedly told the author beforehand that he would rule against him, and did not give him an opportunity to present his point of view during the proceedings. The author states that this judge was dismissed from the Court in 1990. He further claims that a lay judge in the Town Court in Brno, on 24 June 1991, threatened him and told him that he was a child kidnapper.

3.3 The author claims that the failure of the Courts to grant him custody of the child, notwithstanding recent expert opinions that the mother is considered incapable of caring for the child, constitutes a violation of human rights. He alleges that the Czech authorities are of the opinion that a child should stay with the mother under all circumstances and that they do not protect the interests of the child.

The State party's observations and the author's comments thereon

4. By submission of 10 February 1994, the State party provides information about the domestic remedies available in the Czech Republic and confirms that the author has exhausted the remedies that were available at the time of the submission of his communication to the Committee. It adds that, since then, citizens have been given a right to appeal also to the Constitutional Court, but that it is not clear whether the author has done so.

5. In his comments on the State party's submission, the author submits that he presented a complaint to the Constitutional Court on 28 January 1992, but the Court declared his complaint inadmissible on 22 April 1992. He therefore claims that no further domestic remedies are open to him. The author further states that his daughter is still living with him and that she is in good health.

Issues and proceedings before the Committee

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The Committee notes that the State party has raised no objections to the admissibility of the communication and has confirmed that the author has exhausted domestic remedies. Nevertheless, it is the Committee's duty to ascertain whether all the admissibility criteria laid down in the Optional Protocol have been met.

6.3 The Committee further notes that the author claims that the courts were biased against him and wrongfully decided to give custody of his daughter to the mother, and not to him, and not to change his daughter's official place of residence. These claims relate primarily to the evaluation of facts and evidence by the courts. The Committee recalls that it is generally for the courts of States parties to the Covenant, and not for the Committee, to evaluate facts and evidence in a particular case, unless it is apparent that the courts' decisions are manifestly arbitrary or amount to a denial of justice. In the instant case, which relates to the complex issue of child custody, the information before the Committee does not show that the decisions taken by the Czech courts or the conduct of the Czech authorities have been arbitrary or amounted to a denial of justice. Accordingly, the communication is inadmissible under article 3 of the Optional Protocol.

7. The Committee therefore decides:

(a) That the communication is inadmissible under article 3 of the Optional Protocol;

(b) That this decision shall be communicated to the State party and to the author of the communication.

[Adopted in English, French and Spanish, the English text being the original version.]

Notes

a/ The Optional Protocol entered into force for the Czech and Slovak Federal Republic on 12 June 1991. On 31 December 1992, the Czech and Slovak Federal Republic ceased to exist. On 22 February 1993, the Czech Republic notified its succession to the Covenant and the Optional Protocol thereto with retroactive effect as of 1 January 1993.

Appendix

Individual opinion submitted by Mr. Bertil Wennergren pursuant to rule 92, paragraph 3, of the rules of procedure of the Human Rights Committee, concerning communication No. 498/1992

(Zdenek Drbal v. the Czech Republic)

The author's communication is against the Czech courts' decisions awarding custody of his daughter Jitka, born on 6 March 1983, to her mother Jana Drbalova. The author's complaints are directed primarily against the decisions by the Brno-venkov District Court (P 120/85), the Regional Court in Brno (No. 12 CO 626/86) and the Town Court of Brno (decision of 24 June 1991) and the way in which the courts conducted the proceedings. In my opinion, the communication concerns, just as much, the interests of his daughter.

The author has informed the Committee that Jitka was not well treated by her mother, and that in 1985, a local doctor, Dr. Anna Vrbikova, alerted the Child Care Section of the district authorities. Jitka's mother was later admitted to a psychiatric hospital for care and the author moved in with his parents with Jitka and lived there. He asked the Brno-venkov District Court to give him custody of Jitka. Jitka had, after her mother's assumed negligence *vis-à-vis* her, to be taken into regular care as an out-patient at the psychiatric section of the university hospital of Brno, under the supervision of head physician Dr. Vratislav Vrazal. At the court proceedings, Dr. Vrazal gave evidence. According to the author he stated that Jitka was content with her life with the author and that, from a medical point of view, he did not recommend that the child be taken away from her father. Another expert opinion was given by Dr. Vera Capponi, who stated that Jitka's mother was well able to take care of Jitka and that she was better capable of doing it than the author. In its decision on 8 September 1986, the Court decided to give the custody of Jitka to her mother. The Regional Court of Brno confirmed that judgement in its decision of 11 March 1987. The author, however, refused to hand Jitka over to her mother. On 13 July 1988, an attempt was made to enforce the Courts' decisions and have Jitka handed over to her mother, with the assistance of the police. A member of the Child Care Section of the Brno-venkov district authorities was present as well as the president of the court and Jitka's mother and her legal adviser. Jitka, then 5 years old, refused to leave her father's home and the attempt was stopped without result. Two months earlier, the author had made a request to the District Court for a change of custody. Two experts in psychiatry and psychology, Dr. Marta Holanova and Dr. Marta Skulova submitted a report dated 17 July 1989, in which they recognized, according to the author, that he was capable of bringing up his daughter on his own and that in the event of a forcible removal from her father, she would suffer health hazards. The Court forwarded his request for a rehearing to the Town Court of Brno, which rejected his claims on 24 June 1991. Jitka was then 8 years old and is now 11 years old; she still lives with the author and his parents.

It is not apparent from the material that was submitted to the Committee that the courts' decisions were manifestly arbitrary or amounted to a denial of justice. Neither the records from the court proceedings nor their decisions and the reasons given for them have, however, been available to the Committee. They would in all likelihood not reveal any flagrant miscarriage of justice. Instead, what is of real concern to me is that the situation, after the court decisions and the failed enforcement, has developed into a factual anomaly which might jeopardize the healthy, sound and safe development of the child. The author alleges that as long as the mother has legal custody, his daughter continues to be exposed to possible health damages. She cannot move freely, especially at school, as she constantly runs the risk of an enforced withdrawal to an unknown environment. She does not know her mother. By virtue of all this, she suffers mentally. This anomalous situation is alarming and it is caused, whether inadvertently or not, by the courts' failure to handle the matter, as is now obvious, in an appropriate way. The shortcomings work, in my opinion, to the detriment of the best interests of the child. The communication, in my opinion, therefore raises issues under article 24, paragraph 1, of the Covenant, which entitles every child to such measures of protection as are required on the part of its family, society and the State. I consider the communication admissible in that respect.

[Done in English, French and Spanish, the English text being the original version.]

O. Communication No. 502/1992, S. M. v. Barbados (decision adopted on 31 March 1994, fiftieth session)

Submitted by: S. M. [name deleted] (represented by counsel)

Alleged victim: The author

State party: Barbados

Date of communication: 12 May 1992

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 31 March 1994,

Adopts the following:

Decision on admissibility

1. The author of the communication is S. M., a citizen of Trinidad and Tobago, residing in Trinidad. He claims to be a victim of a violation by Barbados of article 14, paragraph 1, of the International Covenant on Civil and Political Rights. He is represented by counsel.

The facts as submitted by the author

2.1 The author is the owner of and sole shareholder in a Barbadian company, S. Foods Limited, which traded in Barbadian foodstuffs, including, in particular, refrigerated food, kept in cold storage facilities on its premises. The company had insured its stock with the Caribbean Home Insurers Limited against loss or damage caused by change of temperature resulting from the total or partial disablement of the refrigerating plant by any of the perils insured against.

2.2 In November 1985, a quantity of lobster was lost by damage from water, caused by heavy rainfall. According to the author, this loss, amounting to 193,689.18 Barbados dollars, a/ was covered by the terms of the insurance. The insurance company, however, repudiated liability. On 8 April 1986, S. Foods started a civil suit against the insurance company before the High Court of Barbados. The case was fixed for hearing on 3 June 1987.

2.3 On 16 May 1987, the insurance company applied for an order that S. Foods should provide security for costs, on the ground that it was in serious financial difficulties and would therefore be unable to pay the insurance company's costs if it failed in its claim. On 26 May 1987, the judge ordered S. Foods to provide security and stayed the proceedings until the security had been paid; the amount was set at BDS$ 20,000.

2.4 The author submits that the judge had no power under the law to order his company to provide the security. A provision in the Companies Act providing that a company might be ordered to post security for the costs of the defendant in a civil action, had been repealed on 1 January 1985. The author further submits that, because of the inability of his company to provide security, his case has not been heard by the Court to date. The author states that his company did not appeal the order, since, even if the Court of Appeal would have granted leave, it would have ordered security for the costs of the appeal, probably in the amount of BDS$ 15,000, which S. Foods would have been unable to pay.

2.5 The author submits that the insurance company has no legal basis to oppose the claim for payment of the insurance money, that it would certainly have lost the court proceedings and that it only requested the security in order to delay or stall the court's determination of the case.

2.6 On 26 June 1987, S. Foods applied to the High Court for redress under section 24 of the Constitution. It was claimed that the judge's order denied the constitutional right of access to court for the determination of civil rights and obligations and the right to a fair hearing of the case within a reasonable time. On 8 December 1988, the High Court dismissed the application. On 26 February 1990, the appeal against the judgment was rejected by the Court of Appeal of Barbados. Subsequently, S. Foods sought special leave to appeal to the Judicial Committee of the Privy Council, which dismissed the appeal on 20 January 1992. The author's company was ordered to pay the costs of the appeals.

2.7 The Courts agreed with the author that the judge had no statutory power to make the order for security, but based their decisions to dismiss the claim for redress on section 24, paragraph 2, of the Constitution, which provides that the High Court shall not exercise its constitutional powers of redress when adequate means of redress are or have been available under any other law. They considered that the wrong the author's company claimed to suffer as a result of the order for security of costs, could have been repaired by the exercise of the right of appeal to the Court of Appeal.

2.8 As to the author's contention that this remedy was not effective, since his company might have been ordered to post security for the costs of the appeal which was beyond its resources, the Privy Council considered that S. Foods should first have tried to avail itself of the appeal before considering it ineffective. In this context, the Privy Council considered that it would have been highly improbable that, in the specific circumstances of the case, the Court of Appeal would have ordered payment of security or, if ordered, that it would have been an amount that S. Foods could not have afforded.

The complaint

3. The author claims to be a victim of a violation of article 14 of the Covenant, since he was denied a fair and public hearing of his case by a competent, independent and impartial tribunal, within the meaning of article 14, paragraph 1.

The State party's observations and the author's comments thereon

4.1 By submission of 14 June 1993, the State party argues that the communication is inadmissible. It contends that the author has provided no basis for his claim that he was denied a fair and public hearing within the meaning of article 14 of the Covenant. It submits that even if the order of the judge to pay security was erroneous under the laws of Barbados, this does not amount to a violation of article 14.

4.2 The State party further argues that the author failed to exhaust domestic remedies and submits that the author had, at all times, a right to appeal the order made by the judge, but that he unjustifiably failed to exercise this right. In this connection, the State party argues that the Court of Appeal would certainly have granted leave to appeal, and that it is inconceivable that security would have been ordered for the costs of the appeal, since such order was the subject-matter of the appeal. The State party submits that any complainant should first avail himself of available means of redress before contending that available domestic remedies are ineffective.

4.3 In this context, the State party refers to the hearing before the Privy Council, during which Their Lordships pointed out that S. Foods Ltd. could still seek leave to appeal, and that it would be inconceivable that the Court of Appeal would not grant leave or that it would require security.

5.1 In his comments on the State party's submission, author's counsel argues that an appeal to the Court of Appeal from the judge's order would not have been an effective remedy because the insurance company could have asked for security under the existing law relating to appeals. In this connection, the author submits that the Privy Council's remark that the Court of Appeal might not have ordered security, or that security might not have been substantial, was speculative.

5.2 He further argues that the redress provided by an appeal would have been inadequate, since it would have been limited to reversing the order for security of costs and would not have undone the delay created by the judge's order. However, under section 24 of the Constitution, the High Court could not only have revoked the order but also have awarded damages for the loss of the opportunity to have the case heard without delay, thereby providing a more appropriate redress. In this connection, counsel argues that the judge's order caused further delay in an urgent matter, on the solution of which the company depended on to stay in business.

5.3 It is submitted that the local Courts and the Privy Council misinterpreted section 24 of the Constitution, which, according to the author, relates to redress at first instance from the time a fundamental right is violated. Counsel argues that, since the Courts and the Privy Council were of the opinion that the security order did indeed violate the company's right of access to court, they should have revoked the order and awarded compensation.

5.4 The author submits that the suggestions made by the Privy Council, namely, that he should apply for leave to appeal to the Court of Appeal out of time, imply that he must incur further costs without the guarantee of a result. He reiterates that the legal error made by the judge of the High Court amounts to a denial of his fundamental right to have his case heard by the court.

Issues and proceedings before the Committee

6.1 Before considering any claim contained in a communication, the Human Rights Committee must decide, in accordance with rule 87 of its rules of procedure, whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The Committee notes that the author has submitted the communication claiming to be a victim of a violation of his right under article 14, paragraph 1, to have access to court, because the judge at first instance ordered the company of which he is the owner and sole shareholder to pay security and then stayed the proceeding until payment. The author is essentially claiming before the Committee violations of rights of his company. Notwithstanding that he is the sole shareholder, the company has its own legal personality. All domestic remedies referred to in the present case were in fact brought in the name of the company, and not of the author.

6.3 Under article 1 of the Optional Protocol only individuals may submit a communication to the Human Rights Committee. The Committee considers that the author, by claiming violations of his company's rights, which are not protected by the Covenant, has no standing under article 1 of the Optional Protocol.

7. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under article 1 of the Optional Protocol;

(b) That this decision shall be communicated to the State party, to the author and to his counsel.

[Adopted in English, French and Spanish, the English text being the original version.]

Notes

a/ BDS$ 1 = US$ 0.5.

P. Communication No. 504/1992, Denzil Roberts v. Barbados (decision adopted on 19 July 1994, fifty-first session)

Submitted by:	Denzil Roberts (represented by counsel)
Alleged victim:	The author
State party:	Barbados
Date of communication:	1 June 1992 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 19 July 1994,

Adopts the following:

Decision on admissibility

1. The author of the communication is Denzil Roberts, a Barbadian citizen born in 1963, awaiting execution at Glendairy Prison, Barbados. He claims to be a victim of violations by Barbados of articles 6, 7 and 14, paragraph 3 (c), of the International Covenant on Civil and Political Rights. He is represented by counsel.

The facts as submitted by the author

2.1 The author and his co-defendant, C. T., were arrested in August 1985 and charged with the murder, in July 1985, of one M. C. They were tried in January 1986. C. T. was found guilty as charged. [a] Since the jury could not agree on the question of the author's guilt, a retrial was ordered and held, and the author was convicted of murder and sentenced to death on 24 April 1986. His appeal to the Court of Appeal of Barbados was dismissed on 11 March 1988; the Court produced its written judgement on 17 June 1988. The author then sought leave to appeal to the Judicial Committee of the Privy Council. Leading counsel in London, however, advised that there was no merit in presenting the case to the Judicial Committee of the Privy Council.

2.2 The prosecution's case rested entirely on a written confession made by the author on 12 August 1985. During the trial, the author made an unsworn statement in which he stated that he had been forced by the police to sign the confession and that he was innocent. He claimed that he had signed his name to the confession following police violence and ill-treatment, and as a result of inducements held out to him. The statement was admitted in evidence after a *voir dire*.

2.3 The author's conviction was based on the application of the "felony-murder" or constructive malice rule, that is, malice which is not shown by direct proof of an intention to cause injury, but which is inferentially established by the necessarily injurious results of the acts shown to have been committed. [b] In directing the jury, the judge told the jurors that if they found that the statement (the author's confession) was voluntary and it disclosed a common design on the part of the author and C. T. to steal, and C. T. went beyond the common plan to steal and murdered M. C., and the author was in no way involved in that plan to murder, if they were doubtful then they should find him not guilty. But if, on the other hand, they felt sure that the common plan to rob M. C. included the use of whatever force was necessary to achieve that object or to permit their escape without fear of subsequent identification, and that the author was there aiding and abetting and fully participated in the killing of M. C. by tying up his feet with wire while C. T. pointed a gun at him, then subsequently taking that gun and pointing it at M. C. while C. T. put the wire around M. C.'s neck and strangled him, then they should find the author guilty of murder.

2.4 On 23 May 1992, a warrant was read out to the author for his execution on 25 May 1992. Counsel immediately filed a constitutional motion on the author's behalf, and a stay of execution was granted on 24 May 1992. On 29 September 1992, the court of first instance dismissed the constitutional motion; c/ the author's appeal against the decision of the court of first instance was dismissed by the Court of Appeal of Barbados on 2 April 1993. A petition for leave to appeal against the dismissal of the constitutional motion by the courts of Barbados is currently pending before the Judicial Committee of the Privy Council.

2.5 The appeal against the dismissal of the constitutional motion was based on the following grounds:

(a) The constructive malice rule in murder, and sections 2 and 3 of chapter 41 of the Offences against the Person Act (which deals with the death sentence being mandatory in murder cases), are incompatible with the Constitution of Barbados;

(b) Whether the author has a right to the exercise of the prerogative of mercy by the Governor-General, in particular in view of the delay in the execution of the sentence of death;

(c) Commutation of the death sentence would be an appropriate remedy for the violations suffered by the author during the course of the police investigations, namely beatings by the police and denial of access to counsel;

(d) The delay in the execution of the death sentence amounts to inhuman or degrading punishment or other treatment, in violation of the Barbados Constitution and article 7 of the International Covenant on Civil and Political Rights;

(e) The provisions of the Covenant and of the Optional Protocol thereto are self-executing and should therefore be directly enforceable by individuals. The courts should recognize that the author has the right to place his case before the Human Rights Committee pursuant to the Optional Protocol and to have the Committee's views put to the Government of Barbados, and/or, alternatively, the author has a legitimate expectation, based on the State party's accession to the Covenant and the Optional Protocol, that the sentence of death will not be carried out before the Committee has adopted its final decision in the case.

2.6 When considering ground (a), the Court of Appeal referred, inter alia, to article 6, paragraph 2, of the Covenant, and to article 4, paragraph 2, of the American Convention on Human Rights. It noted that, since Barbados has not abolished the death penalty, the imposition of the death sentence for the most serious crimes is not in violation with these provisions, and that the question of what constitutes a "most serious crime" for the purpose of those provisions obviously has to be determined in Barbados and nowhere else. With respect to ground (e), the Court of Appeal observed that since Barbados has not enacted legislation to fulfil its treaty obligations under the Covenant and the Optional Protocol, the provisions enabling written representations to the Human Rights Committee, and the procedural and other provisions thereunder, are not part of the law of Barbados. It concluded that: "after a sentence of death is imposed and legal procedures are concluded and legal rights are at an end, the condemned man may seek extra-legal relief from the Governor-General ... He can additionally make written representations for leniency to the Human Rights Committee established by the International Covenant, but that, on the state of the law, is not a matter with respect to which this court can adjudicate".

2.7 In respect of the argument that the author has a legitimate expectation that the State party would not carry out the sentence of death before his rights under the Covenant and Optional Protocol have been considered by the Committee, the Court of Appeal stated that "this argument fails because all the legal appellate procedures are exhausted, the sentence of death remains in effect, and the only avenue now open is extra-legal and extra-judicial" (meaning the prerogative of mercy by the Governor-General).

The complaint

3.1 As to the author's trial, counsel points out that, although there was no evidence that the author actually killed M. C., the jury must have concluded from the judge's instructions that the author participated in the killing. It is submitted that by applying the constructive malice rule in the author's case, which fails to distinguish between murder in the first degree and in the second degree, the imposition of the death penalty violates article 6 of the Covenant, under which it should only be imposed for the most serious crimes.

3.2 Counsel observes that the author has been detained on death row for almost eight years. The inherent uncertainty of the author's position as a person under sentence of death, prolonged by the delays in the judicial proceedings, are said to cause severe mental stress which amounts to cruel, inhuman and degrading punishment, in violation of article 7 of the Covenant.

3.3 Counsel notes that the author was tried in January 1986, that he was convicted in April 1986 after a retrial and that his appeal was dismissed in March 1988. He further notes that the author, as a poor person, depended on legal aid throughout the judicial proceedings against him. Three days after the dismissal of the author's appeal by the Court of Appeal of Barbados, the Record of Appeal was sent to solicitors in London so that an appeal could be lodged with the Judicial Committee of the Privy Council. However, it was only in August 1989 that the competent authorities in Barbados provided retainer's fees to the English solicitors, who then proceeded with the preliminary steps of petitioning the Judicial Committee of the Privy Council. d/ It is submitted that the judicial proceedings against the author have been unreasonably prolonged, in violation of article 14, paragraph 3 (c).

The State party's information and observations and counsel's comments thereon

4.1 By letter of 10 September 1992, the State party notes that the Privy Council in Barbados, which was established under section 76 of the Barbados Constitution to advise the Governor-General on the exercise of the prerogative of mercy, reviewed the author's case but did not recommend that the death sentence be commuted.

4.2 The State party further notes that, accordingly, all domestic remedies have been exhausted and that the death sentence stands. It states that the author's execution will not take place before the constitutional motion (which at the time of the State party's submission was pending before the court of first instance) had been heard. No reference is made to the Special Rapporteur's request for interim measures of protection under rule 86 of the Committee's rules of procedure, which had been transmitted to the State party on 2 and 14 July 1992. Since July 1992 no further information has been received from the State party in respect of the author's constitutional motion.

5.1 By a letter of 24 November 1992, counsel notes that the court of first instance dismissed the constitutional motion on 29 September 1992, but granted a temporary stay of execution for six weeks until 10 November 1992; during this period, the author appealed to the Court of Appeal and applied for a stay of execution, pending the hearing of the appeal against the decision of the court of first instance. The Court of Appeal, on 19 November 1992, granted the stay of execution.

5.2 Counsel observes that the court of first instance refused to grant the author a stay of execution pending the consideration of his communication by the Human Rights Committee, and that it found that the author could not invoke the provisions of the Covenant, that the Covenant was not part of the law of Barbados and that it did not bind the Government of Barbados in respect of its citizens.

Issues and proceedings before the Committee

6.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The Committee notes that the issues raised by the author in his communication are related to the grounds of appeal raised in his constitutional motion. It further notes that a petition for leave to appeal against the dismissal of the constitutional motion by the Court of Appeal of Barbados remains pending before the Judicial Committee of the Privy Council. Accordingly, all available domestic remedies have not been exhausted, as required under article 5, paragraph 2 (b), of the Optional Protocol.

6.3 The Committee notes with concern the findings of the Court of Appeal of Barbados in respect of the author's constitutional motion, referred to in paragraphs 2.6 and 5.2 above. By ratifying the Covenant and the Optional Protocol, Barbados has undertaken to fulfil its obligations thereunder and has recognized the Committee's competence to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by the State party of any of the rights set forth in the Covenant. While the Covenant is not part of the domestic law of Barbados which can be applied directly by the courts, the State party has nevertheless accepted the legal obligation to make the provisions of the Covenant effective. To this extent, it is an obligation for the State party to adopt appropriate measures to give legal effect to the views of the Committee as to the interpretation and application of the Covenant in particular cases arising under the Optional Protocol. This includes the Committee's views under rule 86 of the rules of procedure on the desirability of interim measures of protection, to avoid irreparable damage to the victim of the alleged violation.

7. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under article 5, paragraph 2 (b), of the Optional Protocol;

(b) That, since this decision may be reviewed under rule 92, paragraph 2, of the Committee's rules of procedure upon receipt of a written request by or on behalf of the author containing information to the effect that the reasons for inadmissibility no longer apply, the State party shall be requested, taking into account the spirit and purpose of rule 86 of the Committee's rules of procedure, not to carry out the death sentence against the author before he has had reasonable time, after completing the effective domestic remedies available to him, to request the Committee to review the present decision;

(c) That this decision shall be transmitted to the State party and to author's counsel.

[Adopted in English, French and Spanish, the English text being the original version.]

Notes

a/ C. T.'s death sentence was commuted to life imprisonment in 1989.

b/ "A person using violent measures in the commission of a felony involving personal violence does so at his own risk and is guilty of murder if those violent measures result even inadvertently in the death of the victim"; R. v. Jarmain (1945) 2 ALL ER 613.

c/ The author's constitutional motion and the constitutional motion of P. B. (see annex X.L above, communication No. 489/1992, decision on admissibility adopted on 19 July 1994, at the Committee's fifty-first session) were consolidated by agreement.

d/ Eventually, counsel in Barbados decided, upon advice of leading counsel in London, that the appeal to the Judicial Committee of the Privy Council should not be pursued, because of lack of prospect of success.

Q. Communication No. 509/1992, A. R. U. v. the Netherlands (decision adopted on 19 October 1993, forty-ninth session)

Submitted by:	A. R. U. [name deleted] (represented by counsel)
Alleged victim:	The author
State party:	The Netherlands
Date of communication:	21 April 1992 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 19 October 1993,

Adopts the following:

Decision on admissibility

1. The author of the communication is Mr. A. R. U., a Dutch citizen, presently residing in Delft, the Netherlands. He claims to be a victim of a violation by the Netherlands of articles 4, 5, 6, 7, 14, 18 and 26 of the International Covenant on Civil and Political Rights. He is represented by counsel.

The facts as submitted by the author

2.1 In early 1987, the author received notice that he would be drafted for military service later that year. He objected, arguing that by performing military service, he would become an accessory to the commission of crimes against peace and the crime of genocide, as he would be forced to participate in the preparation for the use of nuclear weapons. His objections were rejected by the authorities.

2.2 Subsequently, the author initiated court action by summary procedure, requesting the Court for an injunction against drafting him for military service, or, alternatively, for a postponement until the merits of his objections against military service could be decided. On 31 March 1987, the president of the Hague District Court (Arrondissementsrechtbank) rejected his request, considering that the request was premature, since the author's objections concerned an eventual nuclear war, and not military service as such. On 28 April 1988, the Hague Court of Appeal (Gerechtshof) rejected the author's appeal, considering that he could have filed an application under the Act on Conscientious Objection to Military Service (Wet Gewetensbezwaren Militaire Dienst), which would have allowed an evaluation of the authors' objections with a view to exempting him from military service. The Supreme Court (Hoge Raad), on 12 January 1990, dismissed the author's appeal in cassation.

2.3 From the judgement of the Court of Appeal it appears that prior to his court action, the author had requested to be exempted from military service under article 15 of the Military Service Act (Dienstplichtwet), which can be invoked in "special cases". This request was dismissed and, on 18 December 1986, the author's appeal was rejected by the Council of State (Raad van State), the highest relevant judicial instance. On 3 September 1987, he was arrested for not reporting for military service. On 3 December 1987, the Military Court

(Krijgsraad) sentenced him to six months' imprisonment for refusal to obey military orders. The author appealed this judgement, and the Supreme Military Court (Hoog Militair Gerechtshof) rendered its judgement on 16 March 1988. However, no information is provided as to the contents of this judgement.

The complaint

3.1 The author contends that military service in the Netherlands, within the framework of the defence strategy of the North Atlantic Treaty Organization (NATO), which is based on the threat and use of nuclear weapons, violates articles 6 and 7 of the Covenant. He submits that the possession of nuclear arms and the preparation for the use of nuclear weapons is in violation of public international law and amounts to a crime against peace and a conspiracy to commit genocide. In this connection, he refers inter alia to general comment 14 (23) of the Human Rights Committee [a] on article 6 of the Covenant. He argues that the army of the Netherlands is a criminal organization, since it is preparing a crime against peace by envisaging the use of nuclear weapons.

3.2 The author argues that by doing military service his life is being endangered because of measures of retaliation in case of the use of nuclear weapons by NATO. He also submits that the use of nuclear weapons by NATO, through its consequences such as fall-out and nuclear winter, directly affects his right to life and his right not to be subjected to torture or to cruel, inhuman or degrading treatment. He argues that the Human Rights Committee should provide protection to such threat of a violation of these rights. He further claims that to be forced to become an accessory to crimes against peace and to violations of the right to life and the right not to be tortured, makes him a victim of the violation of these articles.

3.3 The author also contends that he is a victim of a violation of articles 14 and 26 of the Covenant because he has allegedly been denied fair treatment before the Supreme Court, which held that he was not entitled to seek a remedy from a civil court, since he could have filed an application under the Conscientious Objection Act. The author argues, however, that this law was created for conscientious objections to lawful obligations, arising from military service, not for objections to obligations that are illegally imposed and violate international law.

3.4 The author further claims to be a victim of article 18 juncto 5 of the Covenant. By considering that the author should have applied for alternative service under the Conscientious Objection Act, the Supreme Court limited the author's objections with regard to the illegal character of the military service to a matter of conscience. The author, however, argues that article 18 of the Covenant only applies in case of a conflict between one's conscience and a valid legal obligation. Thus, according to the author, the Supreme Court did not correctly interpret article 18 of the Covenant, thereby preventing him from protesting the participation by the defence force of the Netherlands in a conspiracy to commit a crime against peace and the crime of genocide.

Issues and proceedings before the Committee

4.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

4.2 As regards the author's claim that he is a victim of a violation by the State party of articles 6 and 7 of the Covenant, the Committee observes that the author cannot claim to be a victim of a violation of articles 6 and 7 by mere reference to the requirement to do military service. b/ This part of the communication is therefore inadmissible under article 3 of the Optional Protocol.

4.3 The Committee considers that the author has failed to substantiate, for purposes of admissibility, his claim that he is a victim of violations of articles 14, 18 and 26 of the Covenant. This part of the communication is therefore inadmissible under article 2 of the Optional Protocol.

5. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under articles 2 and 3 of the Optional Protocol;

(b) That this decision shall be communicated to the author and, for information, to the State party.

[Done in English, French and Spanish, the English text being the original version.]

Notes

a/ *Official Records of the General Assembly, Fortieth Session, Supplement No. 40* (A/40/40), annex VI.

b/ Ibid. *Forty-sixth Session, Supplement No. 40* (A/46/40), annexes X.T and U, communications Nos. 401/1990 (*J. P. K. v. the Netherlands*), and 403/1990 (*T. W. M. B. v. the Netherlands*), declared inadmissible on 7 November 1991.

R. Communication No. 510/1992, P. J. N. v. the Netherlands (decision adopted on 19 October 1993, forty-ninth session)

Submitted by:	P. J. N. [name deleted]
Alleged victim:	The author
State party:	The Netherlands
Date of communication:	28 April 1992

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 19 October 1993,

Adopts the following:

Decision on admissibility

1. The author of the communication is Mr. P. J. N., a Dutch citizen, presently living in Brunssum, the Netherlands. He claims to be a victim of a violation by the Netherlands of article 14, paragraphs 1 and 3 (e), of the International Covenant on Civil and Political Rights.

The facts as submitted by the author

2.1 The author, a car dealer, was arrested on 13 June 1983 on suspicion of dealing in stolen cars, mainly Mercedes. On 27 February 1984, the Maastricht District Court (Arrondissementsrechtbank) sentenced him to three years' imprisonment. On appeal, the Court of Appeal (Gerechtshof) at 's Hertogenbosch re-evaluated the evidence and again, on 26 November 1984, sentenced him to three years' imprisonment. The author's appeal in cassation was dismissed by the Supreme Court (Hoge Raad) on 10 December 1985. The author's request for review of the Court of Appeal's judgement, on the ground of new evidence, was rejected by the Supreme Court on 9 December 1986.

2.2 On 16 May 1989, the author filed a complaint with the European Commission of Human Rights. On 15 June 1990, he was informed that the Commission had declared his application inadmissible, since it was introduced more than six months after the date of the Supreme Court's final decision in the case.

The complaint

3.1 The author complains that his trial suffered from procedural irregularities. He claims that the evidence of the main witness against him was unlawfully obtained and should have been disallowed by the courts. This main witness, who was an accomplice, allegedly made false statements to the police, after the police had promised him a reduction of sentence. In particular, the author claims that this witness made his statements while in detention from 13 to 17 June 1983, and not, as submitted to the Court, on 20 and 23 June 1983. He alleges that the investigating officers in the case falsified the statements and committed perjury.

3.2 During the trial, as well as during the appeal proceedings, these allegations were raised but dismissed by the court. On 30 September 1985, the witness made a written statement by notarial act, declaring that he had given statements to the police in Heerlen, not on 20 and 23 June 1983, but before 17 June 1983. On 12 December 1985, the author requested the Supreme Court, under article 466 of the Code of Criminal Procedure, to review the Court of Appeal's judgement of 26 November 1984 on the ground that this new evidence raised doubts about the reliability of the testimony of said witness. Subsequently, the Supreme Court ordered an investigation, during which the police officers concerned and the witness were heard. The police officers maintained that the statements were given by the witness on 20 and 23 June 1983. The witness told the investigating officer that the author had asked him to give a written statement to a notary, and that the author had dictated said statement, after which he had signed it. On the basis of the investigation, the Supreme Court dismissed the author's request for review on 9 December 1986. The author's request to prosecute the investigating officers concerned was, on 19 December 1986, dismissed by the Court of Appeal at 's Hertogenbosch.

3.3 The author further alleges that during the appeal proceedings his request for the hearing of expert witnesses was dismissed by the court and that he was not allowed to put certain questions to expert witnesses from the Legal Laboratory of the Ministry of Justice. These expert witnesses had identified cars found on the author's premises as stolen, using a secret working method on the basis of specific characteristics added to the car by the manufacturer. During the appeal hearing, counsel to the author requested the Court for a hearing of staff working for Daimler-Benz in Germany, with a view to understanding better the method of identification used by this company. The Court dismissed this request as belated, considering that counsel had had the opportunity to make such request already during the preliminary proceedings, during the trial at first instance or at the start of the appeal proceedings. Counsel was allowed, however, to play a tape-recording of a telephone interview he had had with a staff member of the Daimler-Benz company.

3.4 During the appeal hearing, on 12 November 1984, the Court did not allow counsel to put a question to the expert witnesses from the Judicial Laboratory concerning the procedure of identification, in particular in respect of the secret characteristics and where they can be found. The Court considered that the reply to that question would damage the effectiveness of criminal investigations in related matters. The Supreme Court, when dismissing the author's appeal in cassation, considered that the Court, taking into account the general nature of the question, was able to conclude that it was not meant to rebut the specific evidence against the author. The Supreme Court concluded that, weighing the interests concerned, the refusal by the Court did not violate the guarantees of a fair trial.

3.5 The author claims that the alleged irregularities during his trial amount to a violation of article 14, paragraphs 1 and 3 (e), of the Covenant.

Issues and proceedings before the Committee

4.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

4.2 The Committee observes that the author's allegations relate primarily to the evaluation of facts and evidence by the courts. It recalls that it is in principle for the courts of States parties, and not for the Committee, to evaluate facts and evidence in a particular case, unless it is apparent that the courts' decisions are manifestly arbitrary or amount to a denial of justice. In the instant case, the Committee has no evidence that the courts' decisions suffered from these defects. This part of the communication is therefore inadmissible under article 3 of the Optional Protocol.

4.3 As regards the author's allegations concerning the hearing of witnesses, the Committee considers that the author has not substantiated, for purposes of admissibility, his claim that the refusal of the Court of Appeal to hear certain expert witnesses and to allow certain questions, was arbitrary and could constitute a violation of article 14, paragraph 3 (e), of the Covenant. This part of the communication is therefore inadmissible under article 2 of the Optional Protocol.

5. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under articles 2 and 3 of the Optional Protocol;

(b) That this decision shall be communicated to the author and, for information, to the State party.

[Done in English, French and Spanish, the English text being the original version.]

S. Communication No. 517/1992, Curtis Lambert v. Jamaica (decision adopted on 21 July 1994, fifty-first session)

Submitted by: Curtis Lambert (represented by counsel)

Alleged victim: The author

State party: Jamaica

Date of communication: 13 February 1992 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 21 July 1994,

Adopts the following:

Decision on admissibility

1. The author of the communication is Curtis Lambert, a Jamaican citizen and fisherman who, at the time of submission of his communication, was awaiting execution at St. Catherine District Prison, Jamaica, and who is now serving a sentence of life imprisonment. He claims to be a victim of violations by Jamaica of article 14 of the International Covenant on Civil and Political Rights. He is represented by counsel.

The facts as submitted by the author

2.1 On 20 July 1987, the author was arrested and charged with the murder, in the evening of 1 July 1987 in the parish of Clarendon, of one D. C. On 21 July 1988 he was found guilty as charged and sentenced to death in the Clarendon Circuit Court. The Court of Appeal of Jamaica dismissed his appeal on 17 April 1989. In December 1992, the author's crime was classified as non-capital murder under the Offences against the Persons (Amendments) Act of 1992; the death sentence was accordingly commuted to life imprisonment.

2.2 In the Clarendon Circuit Court, the prosecution's principal witness, one D. B., a second-degree cousin of the deceased, testified that in the evening of 1 July 1987, he had been standing on the main road, opposite a bar, at the race course in Clarendon, together with another man. He saw D. C. riding down the road on a bike; he called him, whereupon the deceased turned around and rode towards them. D. B. then saw the author appearing from behind a telephone company post, rush towards the deceased and stab him in the back with a long sharp knife. D. B. and the other man ran after the author but could not catch him. D. C. fell from the bike, calling out that "Skipper" - the nickname the author was generally known by - had stabbed him. D. B. further testified that he had been told of an argument between the author and D. C., approximately three and a half weeks prior to the crime.

2.3 Another witness, the brother of D. B., essentially confirmed this version of the events. He added that he had seen the author standing alone by a telegraph pole prior to the incident, holding his hands behind his back. One witness was called on the author's behalf; he testified that he had been out fishing with the author, from 5 p.m. on 1 July 1987 until 6 a.m. the next morning.

2.4 The main issue in the case was proper identification. It was accepted that both witnesses and the deceased had known each other for many years, having attended the same school. As to the lighting of the locus in quo, it was found that the scene had been lit by a 100-watt light bulb on the porch of the bar and by light coming from a house facing the bar, approximately 14 yards away from the scene.

2.5 The author admits that he had had a dispute with the deceased a few weeks prior to the latter's death and acknowledged that he had had a fight with D. B. He contends, however, that he acted in self-defence, because the deceased was carrying a gun at the time of the crime, and that a shot had actually been fired at him. The author contends that he wished to plead guilty to manslaughter, but during the trial his court-appointed lawyer, one D. W., told him not to raise this point and instead to insist that he did not know about the crime.

The complaint

3.1 The author claims that he was denied a fair and impartial trial and that several irregularities occurred in its course. Thus, on the first day of the trial, one member of the jury allegedly was seen talking to the deceased's parents outside the court room; the same person then reportedly sought to influence the other jurors. The judge was informed about the matter and proceeded to disqualify the juror. The author contends, however, that said juror had already influenced the remaining members of the jury, that, consequently, the jury was biased and that the judge should have dismissed the entire jury and ordered the empanelling of another jury.

3.2 The author complains that his court-appointed attorney did not, in spite of his instructions, raise this particular objection in court. In this context, he submits that he was poorly represented, and that he had no means to influence the choice of the lawyer. Allegedly, D. W. was the only legal aid lawyer available; the author asserts that his lawyer was under the influence of alcohol in court, and that his strange behaviour was noted disapprovingly by the trial judge. Before the Court of Appeal, the author was represented by another lawyer, D. C., who did not consult with him and allegedly admitted that he could not find any grounds on which to base the appeal.

3.3 As to the requirement of exhaustion of domestic remedies, the author observes that, after the dismissal of his appeal, he received a letter from his counsel informing him that there were no merits in a petition for special leave to appeal to the Judicial Committee of the Privy Council. A petition for clemency was sent to the Governor-General of Jamaica on 8 November 1989. In 1990, two Queen's counsels, acting as leading counsels, confirmed that in their opinion, a petition to the Judicial Committee would be bound to fail, as the grounds of appeal related to issues of evidence which had not been raised either during the trial or on appeal.

The State party's observations and the author's comments thereon

4. By submission of 7 July 1993, the State party argues that the communication is inadmissible, since the author has failed to petition the Judicial Committee of the Privy Council for special leave to appeal and therefore has not exhausted available domestic remedies.

5.1 In his comments on the State party's submission, counsel refers to the joint opinion of Queen's counsels, which he transmitted to the Committee before and where it was found that there were no merits in a petition to the Privy

Council. He adds, however, that, in view of the State party's objection, he instructed a different counsel to prepare a petition seeking leave to appeal to the Judicial Committee of the Privy Council.

5.2 In a letter dated 6 September 1993, the author informs the Committee that he has retained the services of a lawyer to prepare the filing of a constitutional motion before the Supreme Court of Jamaica.

Issues and proceedings before the Committee

6.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The Committee notes that the author's claims relate primarily to the conduct of the trial by the judge and the evaluation of the evidence by the jury. It recalls that it is generally for the courts of States parties to the Covenant to review the facts and evidence in a particular case. Similarly, it is for the appellate courts of States parties and not for the Committee to review the judge's instructions to the jury or the conduct of the trial, unless it is clear that the instructions to the jury were arbitrary or amounted to a denial of justice, or that the judge manifestly violated his obligation of impartiality. The author's allegations and the trial transcript do not reveal that the conduct of his trial suffered from such defects. In particular, it is not apparent that the judge, by disqualifying one juror after the first morning of the trial and then letting the trial proceed, violated his obligation of impartiality. In this respect, therefore, the author's claims do not come within the competence of the Committee. Accordingly, this part of the communication is inadmissible as incompatible with the provisions of the Covenant, under article 3 of the Optional Protocol.

6.3 In respect of the author's claim that his court-appointed lawyer did not respect his professional obligations and failed to represent him properly, the Committee notes that the trial transcript does not reveal that the lawyer acted in ways incompatible with his mandate; the Committee also notes that neither the author nor his counsel has substantiated the allegations, for purposes of admissibility. In the circumstances, the Committee concludes that the author has failed to advance a claim within the meaning of article 2 of the Optional Protocol.

7. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under articles 2 and 3 of the Optional Protocol;

(b) That this decision shall be communicated to the State party, to the author of the communication and to his counsel.

[Adopted in English, French and Spanish, the English text being the original version.]

T. Communication No. 520/1992, E. and A. K. v. Hungary (decision adopted on 7 April 1994, fiftieth session)*

Submitted by: E. and A. K. [names deleted]

Alleged victims: The authors

State party: Hungary

Date of communication: 22 September 1992 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 7 April 1994,

Adopts the following:

Decision on admissibility

1. The authors of the communication are E. and A. K., two Hungarian citizens residing in Switzerland. They claim to be victims of violations by Hungary of articles 2, paragraphs 1 and 2; 12, paragraphs 2 and 3; 14, paragraph 1; and 17, paragraph 1, of the International Covenant on Civil and Political Rights. The Optional Protocol entered into force for Hungary on 7 December 1988.

The facts as submitted by the authors

2.1 A. K. has been a staff member of the International Labour Office at Geneva since 1976. Until 1984, each change in his contractual status and each extension of his contract was subject to the issuance of a foreign work permit by the Hungarian authorities. Under Hungarian law applicable at the time, this permit was a precondition for the issuance of an exit visa by the authorities, which would allow the author to leave Hungary together with his family and work abroad.

2.2 In March 1984, Mr. K. was appointed to an established post in the International Labour Office. As a result, the Hungarian authorities refused to extend his work permit and summoned him to resign from the post and return to Budapest. The author refused to comply and instead resigned from his post in the Hungarian Ministry of Housing and Urban Development.

2.3 In the autumn of 1984, the municipal police of Budapest, by decision No. 21.320/1984, declared Mr. and Mrs. K. to be citizens staying abroad unlawfully, with effect as of 31 December 1983 (the author's work permit was valid until 30 June 1984). On the basis of this decision, the administration of the Budapest City Council confiscated the authors' apartment property as well as the family home and took them into State ownership. The authors were denied compensation. Their subsequent appeals were rejected by the City Council of

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* The text of an individual opinion submitted by Ms. Christine Chanet is appended.

Budapest, acting as an administrative court, on the grounds that under the then applicable rules and regulations, property of individuals found to be unlawfully staying or residing abroad had to be taken into State ownership. Another consequence of the police decision was that the Hungarian Embassy at Berne, Switzerland, refused to issue to Mr. K. a certificate confirming his accrued rights to social security benefits.

2.4 The authors contend that during this period, and in subsequent years, they have had to endure numerous arbitrary interferences with their private and professional lives. Thus, letters sent from Switzerland to relatives in Hungary were regularly opened and/or delayed for weeks; Mr. K. was denied permission to attend the funeral of his father; in June 1985, the Hungarian Ministry of Labour allegedly intervened with the administration of the International Labour Office, with a view to securing Mr. K.'s dismissal. From 1984 to 1989, the authors complained to the authorities in Budapest about the arbitrary nature of the decisions adopted against them, to no avail. On the contrary, their property was auctioned off in November 1988.

2.5 In January 1990, the authors requested the newly appointed Minister of Justice to reopen their case. The Minister's reply was negative, allegedly only confirming that all domestic remedies had been exhausted. Towards the end of 1991, the authors wrote to the Secretariat for Rehabilitation attached to the Prime Minister's Office and asked that their case be reconsidered. Although the Secretariat's reply presented an apology on behalf of the new Government and promised assistance with respect to the recovery of the authors' property, and although the authors' passports were returned to them, there was no subsequent follow-up on the property issue.

2.6 In 1990, the authors sought legal advice. Their representative first submitted the matter to the Constitutional Court, which declared that it was not competent to decide on the issue of restitution of the authors' property. The Budapest Central District Court was then asked to review the case, but it dismissed the petition on 15 January 1992 without summoning any of the parties. In its decision, the Court confirmed that the authorities had acted lawfully in 1984; it also admitted, albeit in vague terms, that there was no possibility of appealing the decisions of 1984, and that the courts could only have reviewed them from a strictly procedural point of view. Mr. K.'s lawyer appealed to the Court of Appeal, which confirmed the decision of first instance on 10 March 1992 and held that "there was no place for further appeal"; this would appear to imply that leave to appeal to the Supreme Court had been denied. Both the Central District Court and the Court of Appeal further held that the authors had failed to submit their case within the statutory deadlines.

2.7 The authors indicate that they have not submitted their case to another instance of international investigation or settlement.

The complaint

3.1 The authors contend that the Hungarian authorities have violated their rights under article 12 of the Covenant. Thus, the restrictions in their foreign work permit, which specified the country, the period of time and the place of work for which it could exclusively be used, are said to have violated their "right to be free to leave any country". The authors do concede, however, that such restrictions as were imposed by the former regime have been lifted.

3.2 The authors alleged a violation of article 14, paragraph 1, as they were denied the possibility of attending a court hearing in their case or, prior to

1991, of being represented by a lawyer. They argue that the principle of equality of arms was not respected, as neither the municipal police, the Budapest City Council nor the local courts gave them an opportunity to put properly their claims before the competent authorities. Thus, in 1984, the authors only learned about the police decision through the administrative decisions to confiscate their property. In 1991, the Central District Court decided without summoning the parties. The authors further contend that the fact that the City Council's actions, whose effect was similar to that of the decisions of an administrative tribunal, could not be challenged before the regular courts, violated article 14. Finally, it is submitted that the proceedings in the case violated the principle of audiatur et altera pars, under which parties to a case should be entitled to be heard by the courts.

3.3 Finally, the authors allege a violation of article 17, as they were subjected to unlawful interferences with their family and their private life, as well as to unlawful attacks on the professional integrity and the career development prospects of Mr. K. They also consider the confiscation and auctioning of their home and apartment in Budapest an unlawful interference with their family life.

3.4 The authors do acknowledge that many of the events in their case occurred prior to the date of entry into force of the Optional Protocol for Hungary. They note, however, that Hungary ratified the Covenant on 23 March 1976 and that, by March 1984, the Government should have adopted, in accordance with its obligations under article 2, paragraphs 1 and 2, of the Covenant, all the legislative and other measures necessary to give full effect to the rights protected under the Covenant. The fact that the alleged violations of the authors' rights occurred between the entry into force of the Covenant and that of the Optional Protocol for Hungary should not lead to a simple dismissal of their complaint ratione temporis.

The State party's information and observations and the authors' comments thereon

4. In its submission on the admissibility of the communication, the Government points out that the events complained of occurred prior to 7 December 1988, the date of entry into force of the Optional Protocol for the State party. It therefore considers the case inadmissible ratione temporis, referring in this context to article 28 of the Vienna Convention on the Law of Treaties, concerning the non-retroactivity of international agreements.

5.1 In their comments, the authors challenge the State party's argument. They contend that the 1984 decision to declare them persons unlawfully staying abroad still has serious and continuing effects for their present life. Thus, the decision was combined with sanctions which had lasting consequences for their family life: their children, without passports and de facto stateless, applied for Swiss and Canadian citizenship, respectively, whereas the authors retained Hungarian citizenship. The fact that the Government confiscated their property and refused to restore it to them, which made it impossible for the authors to return to their home, is said to constitute a continuing violation of the Covenant. Finally, the intervention of the Hungarian authorities with the administration of the International Labour Office is said to continue to affect Mr. K.'s career development prospects, as he continues to be considered a "special case" by the Office.

5.2 The authors further reiterate that they did not get a fair and public hearing before an independent and impartial tribunal, either under the former communist regime or under the present democratically elected Government. Until the change of government in 1989, the judicial decisions were handed down "without a public hearing and by incompetent administrative authorities". The decisions of these authorities were final, and the authors allegedly did not have the possibility of appealing against them. Under the new Government, in 1990-1991, the authors' request for reopening of the matter was again rejected in proceedings that did not include a public hearing. This again is said to constitute an ongoing and continuing violation of article 14 of the Covenant.

Issues and proceedings before the Committee

6.1 Before considering any claims contained in a communication, the Human Rights Committee must decide, in accordance with rule 87 of its rules of procedure, whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The Committee has noted the authors' claims relating to the confiscation and auctioning of their property by the Hungarian authorities in 1984 and in November 1988. Irrespective of the fact that these events took place prior to the date of entry into force of the Optional Protocol for Hungary, the Committee recalls that the right to property is not protected by the Covenant. The authors' allegations concerning a violation of their right to property are thus inadmissible *ratione materiae*, under article 3 of the Optional Protocol.

6.3 The authors contend that the violations of their rights under article 14 and article 17, paragraph 1, have continued after the entry into force of the Optional Protocol for Hungary on 7 December 1988. The State party has not addressed this point and merely argued that all of the authors' claims are inadmissible *ratione temporis*.

6.4 The Committee begins by noting that the States party's obligations under the Covenant apply as of the date of its entry into force for the State party. There is, however, a different issue as to when the Committee's competence to consider complaints about alleged violations of the Covenant under the Optional Protocol is engaged. In its jurisprudence under the Optional Protocol, the Committee has held that it cannot consider alleged violations of the Covenant which occurred before the entry into force of the Optional Protocol for the State party, unless the violations complained of continue after the entry into force of the Optional Protocol. A continuing violation is to be interpreted as an affirmation, after the entry into force of the Optional Protocol, by act or by clear implication, of the previous violations of the State party.

6.5 In the present case, it is not possible to speak of such a continuing affirmation, by the Hungarian authorities, of the acts committed by the State party prior to 7 December 1988. For one, the authors' passports have been returned to them, and such harassment as they may have been subjected to prior to 7 December 1988 has stopped.

6.6 The only remaining issue, which might arise in relation to article 17, is whether there are continuing effects by virtue of the State party's failure to compensate the authors for the confiscation of their family home or apartment. However, the Committee recalls that there is no autonomous right to compensation under the Covenant, [a] and a failure to compensate after the entry into force of the Optional Protocol does not thereby constitute an affirmation of a prior violation by the State party.

7. In the light of the above, the Human Rights Committee considers that the authors' claims are inadmissible *ratione temporis*.

8. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible;

(b) That this decision shall be communicated to the State party and to the authors.

[Adopted in English, French and Spanish, the French text being the original version.]

Notes

a/ See Official Records of the General Assembly, Forty-fifth Session, Supplement No. 40 (A/45/40), annex X.J, communication No. 275/1988 (S. E. v. Argentina).

Appendix

Individual opinion submitted by Ms. Christine Chanet under rule 92, paragraph 3 of the rules of procedure of the Human Rights Committee concerning communication No. 520/1992 (E. and A. K. v. Hungary

I do not share the reasoning behind the Committee's decision to declare the communication inadmissible under article 14 of the Covenant ratione temporis.

The authors' allegations under article 14 referred to a procedure that took place during a period subsequent to the entry into force of the Optional Protocol, since they were contesting the procedure followed by the Central District Court in 1991, while the Optional Protocol entered into force for Hungary in December 1988.

The Committee could certainly have found that the allegations were not sufficiently supported, but not that article 14 could not be invoked because of the ratione temporis rule.

With respect to article 14, the contents of the case submitted to the national court can be evaluated by the Committee only in terms of the criteria listed in the text itself, i.e., in this particular case, rights and obligations in a suit at law.

With the exception of this criterion relating to substance, article 14 refers to the conditions under which the procedure is conducted, and it is the dates on which the various procedural acts took place that should be taken into consideration when analysing the communication ratione temporis. The dates relating to the substance of the case brought before the national court should not be taken into consideration when applying the ratione temporis rule.

Finally, it is my view that when the Committee considers a communication under the Optional Protocol, its decisions should be guided only by the legal principles found in the provisions of the Covenant itself, and not by political considerations, even of a general nature, or the fear of a flood of communications from countries that have changed their system of Government.

[Done in English, French and Spanish, the French text being the original version.]

U. Communication No. 522/1992, J. S. v. the Netherlands (decision adopted on 3 November 1993, forty-ninth session)

Submitted by: J. S. [name deleted]
(represented by counsel)

Alleged victim: The author

State party: The Netherlands

Date of communication: 26 August 1992 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 3 November 1993,

Adopts the following:

Decision on admissibility

1. The author of the communication is J. S., a Dutch citizen currently detained in the Netherlands. He claims to be a victim of violations by the Netherlands of article 14, paragraphs 1 and 3 (e), of the International Covenant on Civil and Political Rights. He is represented by counsel.

The facts as submitted by the author

2.1 The author was charged with the murder, on 10 June 1985, of a drug dealer, one L. d. J. The prosecution's case was primarily based on statements obtained from the author and his co-accused, one T. H.; both confessed to the police and testified at the preliminary hearing that they had planned to kill L. d. J. as a revenge for his alleged involvement in the killing, several weeks earlier, of T. H.'s ex-boyfriend, one W. E. Initially, T. H. had wanted to kill L. d. J. herself, but the author suggested that he would do so in her place. On 8 June 1985, they drove to Groningen where L. d. J. and the family of W. E. lived. In the early morning of 10 June 1985, the author and T. H. left the home of W. E. and went to the home of L. d. J. While T. H. was waiting in the car, the author entered the house and stabbed L. d. J. several times. He then left the premises and told T. H. what had happened and showed her a blood-stained knife.

2.2 Before the District Court of Groningen, the author confirmed that he had killed L. d. J. On 11 December 1985, the Court found him guilty of being an accessory to murder and sentenced him to 10 years' imprisonment.

2.3 On 19 December 1985, the author appealed to the Court of Appeal of Leeuwarden. During the hearing, on 6 October 1986, the author retracted his earlier statements. He testified that "while I was present in the residence of [L. d. J.], the latter was stabbed several times with a knife". He further testified that "I did not kill L. d. J. When I was in the living-room, there was a third person present. I persist in saying that this third person stabbed L. d. J. I did not mention this before, as I received threats".

2.4 Counsel argued that the author's new version of the events could be corroborated by the statement which L. d. J.'s girlfriend, K. V., had given to the police on 10 and 11 June 1985. She had told the police that she had seen the murderer and described him. The police had shown her several photographs, two of which portrayed H. E., the brother of W. E.; she identified him as the murderer. Following identification through a two-way mirror, she again identified H. E. as the one whom she had seen stabbing her boyfriend. Counsel further argued that, in light of the author's new testimony, the earlier evidence against him was no longer conclusive. Since the author had never been placed on an identification parade, his guilt could only be ascertained if he was confronted with the only eye-witness alleged to be able to identify him. However, from the minutes of the hearing before the Court of Appeal, it appears that counsel as well as the author abandoned the idea of hearing further witnesses.

2.5 On 16 October 1986, the Court of Appeal quashed the District Court's decision, on the basis of a different evaluation of the evidence. It found the author guilty of murder and sentenced him to eight years' imprisonment. The decision was based on the evidence and testimonies before the court of first instance, and on the testimonies and evidence before the Court of Appeal.

2.6 The author then appealed to the Supreme Court, on the ground that the judgement of the Court of Appeal was not sufficiently motivated. Counsel affirmed that the Court of Appeal's findings were based, on one hand, on the author's previous confessional statements, and, on the other hand, on his statement at the hearing that L. d. J. was killed while he, the author, was present at the locus in quo. According to counsel, these statements were contradictory. Therefore, the Court of Appeal should have motivated: (a) why it used as evidence against the author only that part of the statement admitting to his presence at the time of the murder; and (b) why it ignored the author's denial of having committed the crime.

2.7 The Supreme Court dismissed the appeal on 24 November 1987, holding that the author's testimony did not in fact rule out that he himself had committed the crime. The issue of contradiction with the previous confessions did not therefore arise.

2.8 On 12 January 1988, counsel requested the public prosecutor at the District Court of Groningen to review the case once again, on the ground that the author had decided to reveal the identity of the true culprit. The prosecutor refused to comply with the request. The author then petitioned the Supreme Court to review his case. Upon request of the Attorney-General at the Supreme Court, fresh investigations were conducted by the police in March 1989.

2.9 In the course of these investigations, the author testified, inter alia, that, on 10 June 1985, he and T. H. had gone to the home of the deceased with the purpose of punishing him for his involvement in the killing of T. H.'s ex-boyfriend. Upon entering the living-room, he saw H. E. who attacked L. d. J. and stabbed him. According to the author, T. H. plotted with H. E. Furthermore, T. H. reiterated her earlier statements.

2.10 K. V. testified that the intentions of H. E. were known in the neighbourhood. Thus, on 10 June 1985, she gave his name to the police, although she had never seen H. E. before and although she only had had a fleeting glance of the murderer. When she arrived at the police station, she saw a photograph held by one of the police officers, and heard that it concerned H. E. On that ground, she picked out the two photographs similar to the one she had already seen. She gave further evidence about her purported identification of H. E.

2.11 On 5 September 1989, the Supreme Court ruled that the author's request to review his case was inadmissible. It found, inter alia, that:

(a) The new statement of T. H. was substantially in conformity with her previous one that had been used by the Court of Appeal to establish the author's guilt;

(b) K. V.'s statement only shed new light on her previous testimony that H. E. was the murderer; her new statement only clarified why she had identified H. E.; and

(c) The author's testimony that he, as well as H. E., had been present at the locus in quo, was incompatible with K. V.'s statement.

The complaint

3.1 The author alleges a violation of article 14, paragraph 1, because the Court of Appeal used as evidence against him that part of his statement which could not be said to reflect its tenor. While the author concedes that the Court of Appeal was entitled to use that part of his statement, he claims that the Court, in view of its divergent tenor, had to motivate why it left out his declaration that it was not he, but another person, who killed L. d. J.

3.2 The author further claims that article 14, paragraph 1, was violated since the Court of Appeal failed to explain why it rejected counsel's argument that the statement of K. V. was essential for the handling of the case.

3.3 Finally, the author claims that in view of, on the one hand, his denial and, on the other hand, the exculpatory statement made by K. V., the Court of Appeal should have ex officio heard K. V. Furthermore, the Court of Appeal should have ex officio confronted him with K. V., so as to obtain certainty about his guilt. The Court's failure to do this is said to amount to a violation of article 14, paragraph 3 (e), of the Covenant.

Issues and proceedings before the Committee

4.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

4.2 The Committee notes that the author's claims under article 14, paragraph 1, relate in essence to the evaluation of facts and evidence by the Court of Appeal of Leeuwarden. The Committee recalls that it is generally for the appellate courts of States parties to the Covenant to evaluate the facts and evidence in a particular case. It is not, in principle, for the Committee to review the facts and evidence presented to, and evaluated by, the domestic courts, unless it can be ascertained that the proceedings were manifestly arbitrary, that there were procedural irregularities amounting to a denial of justice or that the judge manifestly violated his obligation of impartiality. After careful consideration of the information placed before it, the Committee cannot find such defects. Accordingly, this part of the communication is inadmissible under article 3 of the Optional Protocol.

4.3 As to the author's claims under article 14, paragraph 3 (e), the Committee notes that these issues were raised by counsel during the hearing when he addressed the Court of Appeal. The Committee further notes that counsel subsequently stated that he did not wish to call the witnesses mentioned in his plea, to which the author agreed. Moreover, the Committee notes that the Court of Appeal had access to K. V.'s initial statement to the police. In these circumstances, the Committee considers that the author has failed to substantiate, for purposes of admissibility, his claim that the Court of Appeal's failure to hear ex officio and confront him with K. V. constitutes a violation of article 14, paragraph 3 (e), of the Covenant. In this respect, therefore, the author has no claim within the meaning of article 2 of the Optional Protocol.

5. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under articles 2 and 3 of the Optional Protocol;

(b) That this decision shall be transmitted to the author, to his counsel and, for information, to the State party.

[Done in English, French and Spanish, the English text being the original version.]

V. Communication No. 524/1992, E. C. W. v. the Netherlands (decision adopted on 3 November 1993, forty-ninth session)

Submitted by: E. C. W. [name deleted] (represented by counsel)

Alleged victim: The author

State party: The Netherlands

Date of communication: 22 October 1992 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 3 November 1993,

Adopts the following:

Decision on admissibility

1. The author of the communication (dated 22 October 1992) is E. C. W., a medical doctor, residing in The Hague, the Netherlands. He claims to be a victim of a violation of articles 6 and 7 of the International Covenant on Civil and Political Rights. He is represented by counsel.

The facts as submitted by the author

2.1 On 1 June and again on 6 July 1987, the author participated in a sit-down demonstration on a road leading to the Woensdrecht military base, to protest the preparation for the deployment of cruise missiles on that base. On both occasions, the author was arrested and charged with the offence of obstructing the free flow of traffic on a public road. On 11 February and again on 7 April 1988, the Bergen op Zoom Magistrate's Court (Kantonrechter) found him guilty as charged; he was fined *f*.51 and *f*.120 respectively.

2.2 The author appealed the judgements; on 17 October 1988, the Breda Court (Arrondissementsrechtbank) rejected the appeals against conviction, but decided not to impose a penalty. The author then appealed to the Supreme Court (Hoge Raad), arguing that his convictions should be quashed, since he had acted out of conscience and under necessity. The Supreme Court, on 30 January 1990, rejected the appeals, stating that the absence of legal means to protest the deployment of the cruise missiles had not been shown, and that the Breda Court therefore had lawfully rejected the author's appeal on the ground of necessity.

The complaint

3. The author claims that he had no choice but to protest by all possible means against the deployment of cruise missiles on the Woensdrecht base. He argues that the possession of nuclear weapons and the preparation for the use of nuclear weapons violates public international law and amounts to a crime against peace and a conspiracy to commit genocide. In this context, he submits that the Dutch military strategy violates not only international norms of humanitarian law, but also articles 6 and 7 of the International Covenant on Civil and Political Rights.

Issues and proceedings before the Committee

4.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

4.2 The Committee notes that the author claims that because the Dutch military strategy allegedly violates articles 6 and 7 of the Covenant, he should not have been convicted for violating the law while protesting the deployment of cruise missiles. In this context, the Committee refers to its jurisprudence in communication No. 429/1990, a/ where it observed that the procedure laid down in the Optional Protocol was not designed for conducting public debate over matters of public policy, such as support for disarmament and issues concerning nuclear and other weapons of mass destruction.

4.3 Moreover, before the Committee can examine a communication, the author must substantiate, for purposes of admissibility, his claims that his rights have been violated. In the present case, the Committee considers that the author's conviction for obstructing the free flow of traffic on a public road cannot be seen as raising issues under articles 6 and 7 of the Covenant. The communication is therefore inadmissible under article 2 of the Optional Protocol.

5. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible;

(b) That this decision shall be communicated to the author and to his counsel, and for information, to the State party.

[Done in English, French and Spanish, the English text being the original version.]

Notes

a/ Official Records of the General Assembly, Forty-eighth Session, Supplement No. 40 (A/48/40), annex XIII.G. E. W. et al. v. the Netherlands, declared inadmissible on 8 April 1993.

W. Communication No. 534/1993, H. T. B. v. Canada (decision adopted on 19 October 1993, forty-ninth session)

Submitted by: H. T. B. [name deleted] (represented by counsel)

Alleged victim: The author

State party: Canada

Date of communication: 5 January 1993 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 19 October 1993,

Adopts the following:

Decision on admissibility

1. The author of the communication, dated 5 January 1993, is H. T. B., a citizen of Canada, born in 1939 in Labiau, East Prussia, currently serving a sentence of 25 years' imprisonment in Kingston penitentiary. He claims to be a victim of a violation of articles 9 and 14 of the International Covenant on Civil and Political Rights by Canada. He is represented by counsel.

The facts as presented by the author

2.1 The author was convicted by jury on 13 February 1986 in the court in the city of St. Catherines and sentenced to 25 years of imprisonment without chance of parole for the first degree murder of his wife Hanna. His appeal before the Court of Appeal of Ontario was dismissed on 13 April 1989, and his application for leave to appeal to the Supreme Court of Canada was dismissed on 5 October 1989. On 2 March 1990, the author applied to the Minister of Justice seeking the mercy of the Crown for a direction for a new trial. The application was denied on 19 December 1991. It is submitted that domestic remedies have been exhausted herewith. Counsel states that the same matter has not been submitted for examination under another procedure of international investigation or settlement.

2.2 During the trial, the prosecution claimed that the murder of the author's wife was originally planned for the morning of 5 July 1984, and that on that morning, the author, en route to Toronto and accompanied by his wife, stopped behind a parked blue Nova on the shoulder of Highway 402. Two men, P. A. and T. A., were positioned near the car, while a third, G. F., remained out of sight. Shortly after the author stopped, a police officer pulled over to the scene and the plan could not be executed. In the early evening of 5 July 1984, the author, returning from Toronto with his wife and nephew, again stopped his car at the side of the road on Highway 402 and parked behind the aforementioned blue Nova. Immediately after the car stopped, G. F. approached from a ditch, put a gun to Hanna B.'s head and forced her out of the car, demanding money and jewellery. She was dragged over the guardrail and shot.

2.3 The case for the prosecution was that the author paid money to one B. for the murder of his wife, was involved in the planning of her murder and delivered her to the place where she was killed pursuant to the arrangement. The author, however, testified that he and his wife only stopped by chance at the place where she was subsequently murdered. His defence at the trial, which lasted over 75 days, was that he was not involved in any arrangement to murder his wife.

2.4 The defence of insanity was not raised during the trial, although the author's privately retained counsel adduced substantial evidence of psychiatric impairment. Expert testimony was led as to the victim's state of mind at the time during which the murder was planned and executed, but the expert witnesses were not called upon to render an opinion as to whether the author was legally insane at the time of the murder. In fact, the defence of insanity was expressly disavowed by trial counsel, so that the question of the author qualifying as insane under the terms of the Canadian Criminal Code was not considered by the jury. The trial defence was led on the grounds that the witnesses for the prosecution were not reliable and had their own motives to kill Hanna B., and that the author's testimony was reliable and should have left the jury with a reasonable doubt as to his guilt.

2.5 In the Court of Appeal of Ontario, new counsel not only upheld the author's original defence, but also brought a motion to adduce fresh evidence on the issue of insanity. Included with the motion papers were the affidavits of seven mental health professionals which, according to counsel, clearly make a prima facie case for the issue of insanity. The author was diagnosed as suffering from a psychiatric condition known as organic personality disorder, the essential feature being a marked change in a person's personality, owing to a specific organic factor, in the author's case, frontal brain damage resulting from a stroke in 1982. According to the experts' affidavits, the disorder made the author inter alia incapable of appreciating the nature and consequences of his words and actions.

2.6 The Court of Appeal of Ontario dismissed the application to adduce fresh evidence. It considered that the author should not be permitted to raise this evidence on appeal, since it had already been available to his counsel during the trial. It further found that relying on insanity as an alternative defence was not acceptable, since it led to a position completely inconsistent with that taken before the jury. The Court of Appeal concluded that it would not be in the interest of justice to admit the evidence, since, having regard to all the evidence led at trial, it was unlikely that the jury would have given effect to this alternative defence, taking into account that it would have been vigorously challenged.

The complaint

3.1 The author claims that the failure by the Court of Appeal of Ontario, and subsequently by the Supreme Court of Canada, to consider the evidence of insanity by refusing to hear any argument that referred to that evidence resulted in the deprivation of his liberty without recognition of the procedures established by law, in violation of article 9 of the Covenant. In this context, the author refers to section 16 (1) of the Canadian Criminal Code, which states that "No person shall be convicted of an offence in respect of an act or omission on his part while that person was insane". He contends that said article was violated in his case.

3.2 The author further claims that the failure of the Court of Appeal of Ontario to allow him to adduce fresh evidence with regard to his insanity violates his right to a fair trial and his right to have his conviction and sentence reviewed.

Issues and proceedings before the Committee

4.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

4.2 As regards the author's claim under article 9 of the Covenant, the Committee notes that the author was arrested and detained upon a charge for murder and that he was consequently convicted and sentenced to imprisonment in accordance with Canadian law. The Committee considers that neither the facts of the case nor the author's allegations raise issues under article 9 of the Covenant. This part of the communication is therefore inadmissible under article 3 of the Optional Protocol.

4.3 As regards the author's claim that his right to fair trial has been violated because he was not allowed to produce evidence with regard to his defence of insanity before the Court of Appeal of Ontario, the Committee notes that this defence had already been available to the author during trial at first instance, but that he made a conscious decision not to use it. The Committee further notes that the author's conviction and sentence were reviewed by the Court of Appeal of Ontario, and that the Court decided not to admit the evidence relating to the defence of insanity, in accordance with Canadian law which prescribes that fresh evidence will generally not be admitted if it could have been adduced at trial. The Committee recalls that it is in principle for the courts of States parties to the Covenant, and not for the Committee, to evaluate facts and evidence in a particular case, unless it is apparent that the courts' decisions are manifestly arbitrary or amount to a denial of justice. The Committee has no evidence that the proceedings before the courts suffered from these defects. In the circumstances of the instant case, the Committee concludes that this part of the communication is therefore inadmissible under article 3 of the Optional Protocol.

5. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under article 3 of the Optional Protocol;

(b) That this decision shall be communicated to the author and to his counsel, and, for information, to the State party.

[Done in English, French and Spanish, the English text being the original version.]

X. Communication No. 544/1993, K. J. L. v. Finland (decision adopted on 3 November 1993, forty-ninth session)

Submitted by:	K. J. L. [name deleted]
Alleged victim:	The author
State party:	Finland
Date of communication:	27 February 1993 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 3 November 1993,

Adopts the following:

Decision on admissibility

1. The author of the communication is K. J. L., a Finnish citizen born in August 1921, currently residing in Kymi, Finland. He claims to be a victim of violations of articles 2, 14, 17 and 26 of the International Covenant on Civil and Political Rights.

The facts as presented by the author

2.1 The author's complaint concerns alleged irregularities in a project involving the planning and construction of a private road. The process began in the summer of 1979, when the State land surveyor issued road construction permit No. 106,706, to be implemented in the community of Manthyarju. Under the permit, the author had to cede part of a land tract owned by him for the purpose of the construction of a private road. K. J. L. contends that both the issue and the execution of the permit were unlawful, and that applicable laws and rules and regulations were infringed on many occasions.

2.2 The author contends that such compensation as he received for ceding part of his land was only a fraction of what was lawfully due him. He therefore filed a complaint with the Land Court (maaoikeus) about the way the area through which the road was to be built had been surveyed and the way the road had been mapped. In January 1981, the Land Court found against him in a split three to two decision. The author contends that the "professional lawyers" on the Court a/ found in his favour, whereas the other members of the court, apparently laymen including the district (land) surveyor, found against him.

2.3 The author complains that the procedure before the Land Court was irregular and flawed in many respects. He points to article 174 of the Act governing parcelling of land (Jakolaki), which lays down in detail how road construction permits should be implemented. Allegedly, the procedure prescribed under the law was not respected. Notwithstanding, it was inscribed in the land register on 5 June 1981 that the permit had been properly executed.

2.4 The author appealed the order, but the Supreme Court of Finland denied leave to appeal on 15 May 1981.

2.5 Towards the beginning of 1982, the limit of the road bed was officially marked on the author's ground. The author affirms that this marking should have been done during the initial road survey more than a year earlier; he once more asserts that the district (land) surveyor did not respect the applicable regulations. He adds that in connection with the case, officials of the Land Court made numerous misleading or incorrect statements so that the police, the office of the Chancellor of Justice and the Parliamentary Ombudsman, among others, were led to believe that the entire road-planning and marking process had been legal.

2.6 On 3 June 1982, road construction work started. According to the author, the law was again broken on many occasions in connection with the construction. Requests for assistance from the police went without reply. In order to correct the irregularities in the initial permit, a new road survey order, No. 112559-9 of 13 November 1982, was issued. The author affirms that this merely resulted in his losing what he refers to as "lawful road rights". Subsequently, apparently several years later and following another complaint lodged by the author, the office of the Chancellor of Justice suggested several amendments to the initial permit. In the author's opinion, this new road survey, No. 114 970-8 carried out on 11 May 1988, still did not correct the earlier mistakes. As a result, the situation of the road on his ground still has not been resolved.

2.7 The author notes that after being denied leave to appeal by the Supreme Court, he turned to the Chancellor of Justice to obtain redress. Allegedly, the Chancellor investigated the case for over three years. While the investigation was pending, the author was told, he "could not appeal anywhere else".

2.8 On an unspecified date, the author once more appealed to the Land Court requesting a reversal of the initial judgement of 1981. On 17 January 1990, the Land Court confirmed its earlier decision; on 4 December 1990, the Supreme Court rejected the author's further appeal, on the ground that he had been unable to "substantiate in his appeal any new grounds on which the Land Court ruling should be reversed". The author complains that the Supreme Court did not motivate its decision.

The complaint

3. The author asserts that the entire procedure has caused him considerable "mental anguish" throughout the years, and that the judicial proceedings have been biased and unfair throughout. He claims that the above events, in so far as they are the result of the authorities' and the courts' actions, constitute violations of his rights under articles 2, 14, 17 and 26 of the Covenant, as well as article 12 of the International Covenant on Economic, Social and Cultural Rights. He considers that compensatory payments of 20,000 Finnish markaa per annum, retroactively to 1979, would be appropriate.

Issues and proceedings before the Committee

4.1 Before considering any claims contained in a communication, the Human Rights Committee must determine, pursuant to rule 87 of its rules of procedure, whether or not it is admissible under the Optional Protocol to the Covenant.

4.2 The Committee notes that the author's claims relate essentially to an alleged violation of his right to property; the right to property, however, is not protected by the Covenant. Thus, since the Committee is only competent to consider allegations of violations of any of the rights protected under the

Covenant, the author's allegations concerning the unlawfulness of the road construction through his land are inadmissible ratione materiae, under article 3 of the Optional Protocol, as incompatible with the provisions of the Covenant.

4.3 As to the author's claim concerning the alleged arbitrary and biased nature of the decisions - administrative and judicial - adopted against him, the Committee notes that they relate primarily to the evaluation of a complex factual situation by the Finnish authorities and courts. It is in principle for the courts of the State party and not for the Committee to evaluate the facts and evidence in a particular case, unless it can be ascertained that the evaluation of the evidence by the court was arbitrary, or that the court manifestly violated its obligation of impartiality. On the basis of the information before it, the Committee has no indication that the proceedings in the case suffered from such defects. This part of the complaint is therefore also inadmissible as incompatible with the provisions of the Covenant, pursuant to article 3 of the Optional Protocol.

4.4 Finally, in respect of the author's allegations concerning discriminatory treatment and violations of his rights under article 17 of the Covenant, the Committee finds that these allegations have not been substantiated, for purposes of admissibility. Accordingly, the author has failed to advance a claim under the Covenant, within the meaning of article 2 of the Optional Protocol.

5. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under articles 2 and 3 of the Optional Protocol;

(b) That this decision shall be communicated to the author and, for information, to the State party.

[Done in English, French and Spanish, the English text being the original version.]

Notes

a/ By this, he apparently refers to the professional judges on the Court.

Y. Communication No. 548/1993, R. E. d. B. v. the Netherlands (decision adopted on 3 November 1993, forty-ninth session)

Submitted by:	R. E. d. B. [name deleted] (represented by counsel)
Alleged victim:	The author
State party:	The Netherlands
Date of communication:	15 April 1993 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 3 November 1993,

Adopts the following:

Decision on admissibility

1. The author of the communication is R. E. d. B., a Dutch citizen born on 26 June 1952, currently residing in Leeuwarden, the Netherlands. He claims to be a victim of a violation of article 26 of the International Covenant on Civil and Political Rights. He is represented by counsel.

The facts as submitted by the author

2.1 The author, who is mentally ill, has been confined to a nursing home since 17 August 1971. He came of age on 26 June 1973; until then, his parents had been his legal representatives. On 15 December 1987, a legal guardian was appointed for him. The author states that between 26 June 1973 and 15 December 1987, he depended on the good will of others for the protection and defence of his rights.

2.2 The author visits his parental home during weekends; the visits are said to be of crucial importance for his mental and physical well-being. These visits incur extra travel and boarding expenses. On 2 July 1987, the author, represented by his parents, applied for benefits under the Social Security Act (*Algemene Bijstandswet*) to obtain compensation for these costs. On 24 November 1987, the municipality of Ferwederadeel granted the author benefits in the amount of f. 260.69 per month, to run from the date of application, that is, 2 July 1987.

2.3 The author requested a review of the decision, on the ground that these benefits should have been granted retroactively as of 17 August 1971. On 1 March 1988, the municipality confirmed its earlier decision. The author appealed to the provincial authorities of Friesland, which rejected his appeal on 2 November 1988. On 3 October 1990, the Division for Administrative Litigation of the Council of State (Raad van State, Afdeling Geschillen van Bestuur) dismissed the author's further appeal.

2.4 The Council's Administrative Division considered that under the Social Security Act, no benefits can be granted for a period prior to the date of application, and that it is the applicant's own responsibility to apply for benefits in a timely manner. Only extraordinary circumstances might justify exceptions to this rule. In the author's case, no such circumstances were found to exist. Since the law makes it possible for others to apply for a benefit on behalf of someone, the Council considered that the author's parents could have applied for the benefit on his behalf earlier.

2.5 The Council further noted that during the first period of his stay in the nursing home, the author was still a minor, legally represented by his parents. It further noted that it appeared from the file that the author's parents did in fact look after his interests until a legal guardian was appointed. Since the author's interests were being looked after, the Council found that there had been no need for the municipality to have granted a benefit proprio motu. It rejected the author's claim that article 26 of the Covenant had been violated in the case.

The complaint

3.1 The author claims that, since he had no legal representative from 26 June 1973 to 15 December 1987, he was not capable of filing an application for benefits under the Social Security Act, and that therefore special circumstances existed to grant him benefits with retroactive effect. He claims that the denial of retroactive benefits in his case amounts to a violation of article 26 of the Covenant, since it constitutes a factual discrimination vis-à-vis those who, like him, are mentally handicapped and thus unable to protect their own interests.

3.2 In this context, the author claims that the State should enhance the enjoyment of social rights. This signifies, according to the author, that the Dutch authorities should have granted him benefits on their own initiative, as they were aware of his particular situation.

Issues and proceedings before the Committee

4.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

4.2 The author claims to be a victim of a violation of article 26 of the Covenant because he has not been granted social security benefits retroactively; he claims that, even though he did not apply for benefits earlier, the State party should have granted him benefits proprio motu. The Committee notes that Dutch legislation does not provide for the granting of retroactive benefits under the Social Security Act, and that the Administrative Division of the Council of State considered that no extraordinary circumstances existed that would have justified an exception, since the author's parents could have applied for benefits on his behalf.

4.3 The Committee notes that the author has not substantiated, for purposes of admissibility, that he was denied a retroactive benefit on any of the grounds covered by article 26 of the Covenant or that the provisions of the Social Security Act were not equally applied to him. Accordingly, the Committee finds that the communication is inadmissible under article 2 of the Optional Protocol.

5. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under article 2 of the Optional Protocol;

(b) That this decision shall be communicated to the author and to his counsel, and, for information, to the State party.

[Done in English, French and Spanish, the English text being the original version.]

Z. Communication No. 559/1993, J. M. v. Canada (decision adopted on 8 April 1994, fiftieth session)

Submitted by: J. M. [name deleted]

Alleged victim: The author

State party: Canada

Date of communication: 7 June 1993

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 8 April 1994,

Adopts the following:

Decision on admissibility

1. The author of the communication is a Canadian citizen living in Sherbrooke, Quebec. He claims to be a victim of a violation of articles 14 and 26 of the International Covenant on Civil and Political Rights by Canada.

The facts as submitted by the author

2.1 The author underwent a heart operation in 1978 which was successful but resulted in high blood pressure, controllable by medication. To emphasize his good health, the author mentions that he has successfully participated in two Montreal marathons and several other long-distance runs. On 4 May 1987, the author, who has a bachelor's degree in industrial relations, forwarded his curriculum vitae to the Royal Canadian Mounted Police (RCMP) in order to apply for the post of "personnel agent". On 16 June 1987, during a telephone conversation with a representative of RCMP, he was told that only RCMP members with several years' experience could apply for the post of "personnel agent".

2.2 Subsequently, the author applied for the post of constable. He passed an aptitude test and then filled out some forms in which he provided information about his medical history. On 26 October 1987, the author received a letter from RCMP, informing him that he was refused a post as constable since he did not meet the medical requirements.

2.3 After having requested clarification, the author was informed by the medical officer of RCMP that he was refused on the basis of the questionnaire and without medical examination because of his heart operation and resulting high blood pressure, cartilage (a chondromalacie) in his right knee (corrected in 1983) and his asthma condition.

2.4 Subsequently, the author contacted the Canadian Human Rights Commission in order to file a complaint against RCMP for discrimination. After a preliminary inquiry conducted by the Commission, an official complaint was filed in September 1988. In August 1989, the author authorized the Commission to seek three independent medical specialists to examine the author. On 19 December 1989, the author was contacted by the Secretariat of the Commission; he was told that RCMP had acknowledged that a premature decision had been taken in denying the post to the author without a medical examination. He was invited to apply again, without prejudice. The author claims that the Human Rights Commission failed to make a copy of the said letter available to him. The author was also told that the post of "personnel agent" was a civilian post and that the representative of RCMP had made a mistake in June 1987 by telling him that only members of RCMP could apply for that post.

2.5 The author asked for a guarantee that the selection procedure and medical examination conducted by RCMP would be fair and that he would receive equal treatment. Failing to obtain such guarantee to his satisfaction, he decided to ask for monetary compensation (Can$ 71,948.70) rather than to reapply. On 26 November 1990, he presented his claim to RCMP; no agreement was reached.

2.6 On 4 December 1990, the author was informed that on the basis of the inquiry, a recommendation had been made to the Commission to reject the author's complaint. The author was invited to comment on the recommendation, the text of which was transmitted to him. On 3 January 1991, the author challenged the recommendation and demanded that the Commission investigate his complaint further. In this connection, the author notes that the burden of proof was on him and not on RCMP. On 25 March 1991, the Commission notified the author that it considered that there was no justification for continuing the proceedings.

2.7 On 5 August 1991, the author requested the Federal Court of Canada, Trial Division, for a writ of certiorari, in order to quash the Commission's decision and to force it to have his case examined by the Tribunal des droits de la personne. The author claimed procedural deficiencies during the handling of his case by the Commission, such as the failure to have the author medically examined by independent experts and the disappearance from the file of press clippings about the author's athletic achievements. On 20 September 1991, the Court rejected the author's request, considering that the Commission had exercised its discretion in compliance with the law and the principles of law established in jurisprudence. The judge also noted that the Commission's decision did not affect the author's right to sue RCMP for alleged damages. The author submits that since the judge did not err in law, appeal from his judgement is not possible.

The complaint

3. The author claims that he is a victim of discrimination by RCMP. He further contends that the Canadian Human Rights Commission has violated the rules of fair procedure and has discriminated against him by accepting the insufficient explanation by RCMP. He claims that the facts as described amount to violations of articles 14 and 26 of the Covenant.

Issues and proceedings before the Committee

4.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

4.2 The Committee notes that the author claims he is a victim of discrimination by RCMP, because he was refused a post as a constable solely on the basis of his medical history. The Committee further notes that the police acknowledged having made a mistake in the procedure and invited the author to reapply. The author, however, failed to accept the offer made by the police, demanding monetary compensation instead. The Committee considers that the author has failed to substantiate sufficiently, for purposes of admissibility, that the proposal made to him by the police was not effective and could not lead to a remedy. The author therefore has no claim under article 2 of the Optional Protocol.

4.3 The Committee further considers that the author has failed to substantiate, for purposes of admissibility, his claim that the procedure before the Canadian Human Rights Commission violated his rights under article 14, paragraph 1, of the Covenant, and that he has failed to submit sufficient evidence in support of the claim under article 26 of the Covenant.

5. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under article 2 of the Optional Protocol;

(b) That this decision shall be communicated to the author and, for information, to the State party.

[Text adopted in English, French and Spanish, the French version being the original version.]

AA. Communication No. 565/1993, A. B. v. Italy (decision adopted on 8 April 1994, fiftieth session)

Submitted by: A. B. [name deleted]

Alleged victims: R. and M. H. [names deleted]

State party: Italy

Date of communication: 2 November 1993

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 8 April 1994,

Adopts the following:

Decision on admissibility

1. The author of the communication is A. B., an Italian citizen residing in Bolzano (Bozen), South Tyrol, Italy. He submits the communication on behalf of R. and M. H. and their children, who are said to have fled from Italy to Austria. He contends that the H. family are victims of violations of their human rights by Italy.

The facts as submitted

2.1 Mr. and Mrs. H. have consistently refused to let their four children - three boys and one girl - be vaccinated against poliomyelitis, diphtheria and tetanus. In Italy, the vaccination of children against these diseases is mandatory ("Pflichtimpfung").

2.2 A. B. notes that the regulations on mandatory vaccinations in Italy expose anyone who refuses to have his or her children vaccinated to possible sanctions. Possible sanctions include the withdrawal of parental rights with regard to the children's health care and non-acceptance of children by schools, nurseries or other institutions.

2.3 The author contends that traces of formaldehyde and mercury can be found in the vaccines against poliomyelitis, diphtheria or tetanus, substances which are deemed to be dangerous and whose administration through vaccination is said not to be medically justifiable today.

2.4 A. B. further observes that, in the case of the children of Mr. and Mrs. H., several doctors have advised against vaccinations as "too dangerous". No substantiation in support of this allegation has, however, been provided. All four children were allegedly excluded from their schools or not admitted to other schools. Local and municipal authorities have instituted legal proceedings against the parents, with a view to forcing them to vaccinate their children.

2.5 On 19 October 1993, the Juvenile Court of Trento (Trient) decided, for the second time, to suspend the parents' parental authority and to require the municipal doctor (*Amtsarzt*) to carry out the vaccinations within 14 days, if necessary forcibly. It is submitted, without further explanation, that Mr. and

Mrs. H. have no further possibility of appeal against the judgement of 19 October 1993.

2.6 Finally, A. B. argues that the H. family has had to carry a heavy financial burden as a result of the judicial proceedings instituted by the local authorities. They have had to pay approximately 15,000,000 lire (approximately 60,000 FF) for legal fees and some 2,000,000 lire (approximately 8,000 FF) for medical checks on the children ordered by the courts.

The complaint

3.1 A. B. submits that mandatory or forced vaccinations, based on regulations that have remained virtually unchanged since 1934, constitute a violation of the human rights of the H. family. Furthermore, mandatory vaccinations are said to discriminate against those children whose parents refuse to have them vaccinated. Although the author does not invoke any particular provision of the Covenant, it transpires from his submission that he alleges violations of articles 14, 17 and 26.

3.2 A. B. requests the immediate intervention of the Human Rights Committee with the authorities of the State party, with a view to protecting the rights of the H. family.

Issues and proceedings before the Committee

4.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

4.2 The Committee begins by noting that A. B. has not provided any proof that he is authorized to act on behalf of Mr. and Mrs. H. and their children. In the absence of a power of attorney or other documented proof that the author is authorized to act on behalf of the alleged victims, the Committee must conclude that A. B. has no standing under article 1 of the Optional Protocol.

5. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under article 1 of the Optional Protocol;

(b) That this decision shall be communicated to the author and, for information, to the State party.

[Adopted in English, French and Spanish, the French text being the original version.]

BB. Communication No. 567/1993, Ponsamy Poongavanam v. Mauritius (decision adopted on 26 July 1994, fifty-first session)

Submitted by: Ponsamy Poongavanam

Alleged victim: The author

State party: Mauritius

Date of communication: 1 September 1993 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 26 July 1994,

Adopts the following:

Decision on admissibility*

1. The author of the communication is Ponsamy Poongavanam, a citizen of Mauritius currently detained at the prison of Beau Bassin, Mauritius. He claims to be a victim of violations by Mauritius of articles 2, 3, 14, 25, paragraph (c), and 26 of the International Covenant on Civil and Political Rights.

The facts as submitted by the author

2.1 On 28 March 1987, the author was convicted of murder and sentenced to death in the Assizes Court of Mauritius. He was tried before a judge and a jury of nine men, whose verdict was unanimous. He appealed to the Court of Appeal of Mauritius, on the grounds that the judge had misdirected the jury and committed other procedural errors in the course of the trial.

2.2 The author then applied for leave to appeal to the Judicial Committee of the Privy Council. Leave was granted, but on a ground that had not been raised in the lower courts, namely, that the author's conviction should have been quashed because the trial was unconstitutional, having regard to the composition of the jury, which had been composed of men only. On 6 April 1992, the Judicial Committee dismissed the author's petition on its merits.

2.3 The author subsequently requested the President of Mauritius to exercise his prerogative of mercy. On 29 April 1992, the death sentence was commuted to 20 years' imprisonment, without possibility of parole. Leave was granted to apply to the Supreme Court of Mauritius for constitutional redress. On 16 March 1993, the author's constitutional motion was dismissed. With this, the author submits, all available domestic remedies have been exhausted.

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* Pursuant to rule 84 of the Committee's rules of procedure, Committee member Mr. Rajsoomer Lallah did not take part in the examination of the communication.

The complaint

3.1 The author challenges the compatibility with the Covenant of section 42 (2) of the Courts Act and section 2 of the Jury Act (as they applied prior to 1990). At the time of conviction (March 1987), the Jury Act provided as follows:

> "Every male citizen of Mauritius who has resided in Mauritius at any time at least one full year, and who is between the ages of 21 and 65, shall be qualified and liable to serve as a juror ...".

In 1990, the Jury Act was amended to allow women to have access to trial juries. The Courts Act has not been amended in the same way.

3.2 The author claims that section 42 of the Courts Act, which provides for a jury "consisting of nine men qualified as provided in the Jury Act" violates article 3 of the Covenant, as it is discriminatory vis-à-vis women, who remain, in practice, excluded from jury service.

3.3 It is further submitted that article 25, paragraph (c), of the Covenant was violated, as Mauritian women did not and in practice do not have access, on general terms of equality, to public service, service in a trial jury being interpreted as constituting public service.

3.4 The author contends that the State party violated article 26 of the Covenant, as the exclusion of women from jury service, in fact, means that their equality before the law is not guaranteed.

3.5 Finally, the author contends that he did not have a fair trial. He argues that the register of jury members had not been compiled in accordance with the law. Secondly, he notes that the list of potential jurors from which the nine members of the jury were chosen did not comprise more than 4,000 names, whereas 176,298 Mauritian men would have qualified, in 1987, for jury service. This, according to the author, means that the jurors' list was incomplete and unrepresentative of Mauritian society. The author notes that this practice goes back many years and contends that because juries in the Assizes Court are not representative, the Court cannot be considered as an independent and impartial tribunal within the meaning of article 14, paragraph 1, of the Covenant.

3.6 It should be noted that the Supreme Court of Mauritius, in its judgement of 16 March 1993, addressed the latter point in some detail, in the light of the fair trial provision of the Mauritian Constitution (sect. 10), but found no merit in it. As to the representativeness of the jury, the Judicial Committee carefully analysed the applicable common law and United States jurisprudence on the subject. It concluded that there was "no basis for concluding that before the enactment of the legislative change in 1990 [in the Jury Act] (which appears to have been promoting rather than following a change in public opinion on the matter) the exclusion of women from juries in Mauritius had ceased to have objective justification".

3.7 In an additional submission, the author alleges that his trial was unfair because no stenographers were present throughout its duration, that the judge himself took the notes, and that only the judge's summing up to the jury was made available in the form of a transcript. He claims that in a capital case, Mauritian law prescribes the presence of a stenographer throughout the trial. He adds that the absence of a trial transcript documenting the entire proceedings prevented him from proving inconsistencies and inaccuracies in the pleadings of the prosecutor, whose version of the facts is said to prove that the victim's death was not caused with premeditation, which implies that it could not have sustained a verdict of murder.

Issues and proceedings before the Committee

4.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

4.2 The Committee has noted the author's claim that he is a victim of violations by Mauritius of articles 3, 25, paragraph (c) and 26, because women were excluded from jury service at the time of his trial. The author has failed to show, however, how the absence of women on the jury actually prejudiced the enjoyment of his rights under the Covenant. Therefore, he cannot claim to be a "victim" within the meaning of article 1 of the Optional Protocol.

4.3 As to the author's claim that the jury lists drawn up by the State party's authorities are unrepresentative of Mauritian society, and that therefore the Assizes Court is not an independent and impartial tribunal within the meaning of article 14, the Committee notes that there is no indication that the jury lists referred to by the author were compiled in an arbitrary manner. In the circumstances, it concludes that the author has failed to substantiate, for purposes of admissibility, his claim of a violation of article 14, paragraph 1, in this respect.

4.4 Concerning the author's other claims of unfair trial, the Committee notes that they relate primarily to the evaluation of the evidence by the trial judge and the Assizes Court. The Committee recalls that it is primarily for the appellate courts of States parties to the Covenant and not for the Committee to evaluate facts and evidence placed before the domestic courts. Similarly, it is for the appellate courts and not for the Committee to review instructions to the jury by the judge, unless it is apparent that these instructions were clearly arbitrary or amounted to a denial of justice, or that the judge otherwise violated his obligation of impartiality. The material before the Committee does not show that the author's trial and the appeal suffered from such defects; this applies equally to the alleged absence of shorthand writers during the trial, which the author has not shown to have prejudiced the trial in one of the ways indicated above. This part of the communication is therefore inadmissible as incompatible with the provisions of the Covenant, pursuant to article 3 of the Optional Protocol.

5. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under articles 1, 2 and 3 of the Optional Protocol;

(b) That this decision shall be transmitted to the author of the communication and, for information, to the State party.

[Adopted in English, French and Spanish, the English text being the original version.]

CC. Communication No. 568/1993, K. V. and C. V. v. Germany (decision adopted on 8 April 1994, fiftieth session)

Submitted by:	K. V. and C. V. [names deleted] (represented by counsel)
Alleged victims:	The authors
State party:	Germany
Date of communication:	7 September 1993

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 8 April 1994,

Adopts the following:

Decision on admissibility

1. The authors of the communication are K. V. and C. V., two German citizens residing in Merzhausen, Germany. They claim to be victims of a violation by the Federal Republic of Germany of article 18 of the International Covenant on Civil and Political Rights. They are represented by counsel. The Optional Protocol entered into force for Germany on 25 November 1993.

The facts as submitted by the authors

2.1 The authors are members of the Society of Friends (Quakers). On 7 May 1985, they requested the competent tax authorities (Freiburg-Land) to deduct from their income tax declaration for fiscal year 1983 an amount representing 8.33 per cent, which, according to their calculation, would be allocated to German military expenditures. Alternatively, they requested the fiscal authorities to block this amount in a bank account specifically designated for this purpose (Sperrkonto). They further requested a deduction of 8.45 per cent for advance income tax payments for fiscal year 1985, pursuant to article 227 of the relevant tax legislation (Abgabenordnung).

2.2 On 17 July 1985, the authors' request was rejected by the tax office of Freiburg-Land. Their formal objection (Beschwerde) to this decision was dismissed by the tax directorate for Land Baden-Württemberg on 30 October 1985.

2.3 The authors thereupon filed a complaint with the financial court for Baden-Württemberg (Finanzgericht), which, on 1 June 1989, rejected their complaint as unfounded. The court granted leave to appeal to the Federal Financial Court (Bundesfinanzhof), which, on 6 December 1991, declared the appeal to be unfounded. The authors filed a constitutional motion with the Federal Constitutional Court in Karlsruhe, which on 26 August 1992 denied leave to appeal on the ground that the complaint was "manifestly ill-founded". With this, the authors exhausted available domestic remedies.

2.4 Before the German courts, the authors invoked article 4 of the German Basic Law (Grundgesetz), which guarantees everyone freedom of religion and conscience. They argued that they had insurmountable conscientious objections to the fact that part of their income tax would help to finance military expenditures.

According to the authors, the terms of article 4 of the Basic Law are "stronger than or at least as strong as" the guarantees under article 18 of the Covenant.

2.5 The authors indicate that they are well aware that the Human Rights Committee has previously declared inadmissible two complaints similar to their own, namely, communications No. 446/1991 (*J. P. v. Canada*), declared inadmissible on 7 November 1991, *a*/ and No. 483/1991 (*J. v. K. and C. M. G. v. K.-S. v. the Netherlands*), *b*/ declared inadmissible on 23 July 1992. In those decisions, the Committee had held that "the refusal to pay taxes on grounds of conscientious objection clearly falls outside the scope of protection" of article 18 of the Covenant.

The complaint

3. The authors contend that the State party has violated article 18 of the Covenant. They indicate that they strongly disagree with the Committee's earlier decisions and argue that they would deserve a better *ratio decidendi* and that, in fact, the decisions should be reversed. They argue that as long as individuals have strong conscientious objections to seeing part of their taxes used for military expenditures, and as long as certain countries (such as Germany) continue to spend considerable amounts of taxpayers' money for military purposes, then it is difficult to argue flatly that the refusal to pay income tax on a *pro rata* basis falls outside the scope of article 18 of the Covenant: "The act of tax-paying is not excluded from ... moral beliefs and convictions, and article 18 of the Covenant does not make an exception for this, ... explicitly or otherwise".

Issues and proceedings before the Committee

4.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

4.2 The Committee notes that upon ratifying the Optional Protocol, the Federal Republic of Germany entered the following reservation under article 5, paragraph 2 (a), of the Optional Protocol:

> "... the competence of the Committee shall not apply to communications ... (b) by means of which a violation of rights is reprimanded having its origins in events occurring prior to the entry into force of the Optional Protocol for the Federal Republic of Germany."

As all the events that form the basis of the present complaint occurred between 1985 and 1992, and thus prior to 25 November 1993, the date of entry into force of the Optional Protocol for Germany, the Committee is precluded *ratione temporis* from considering the communication, in the light of the German reservation.

4.3 The Committee cannot fail to note that two of its previous decisions declaring communications inadmissible are in essence dispositive of the authors' claim under article 18 of the Covenant, and that the authors primarily question the *ratio decidendi* of these earlier decisions (see para. 2.5 above). The authors' claim would thus, regardless of the considerations in paragraph 4.2 above, be inadmissible as incompatible with the provisions of the Covenant, under article 3 of the Optional Protocol. As no reasons to depart from the

Committee's jurisprudence in the above decisions have been adduced, the Committee confirms that jurisprudence.

5. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible;

(b) That this decision shall be communicated to the authors, to their counsel and, for information, to the State party.

[Adopted in English, French and Spanish, the French text being the original version.]

Notes

a/ Official Records of the General Assembly, Forty-eighth session, Supplement No. 40 (A/48/40), annex X.Y.

b/ Ibid., annex X.CC.

DD. Communication No. 570/1993, M. A. B., W. A. T. and J.-A. Y. I. v. Canada (decision adopted on 8 April 1994, fiftieth session)

Submitted by: M. A. B., W. A. T. and J.-A. Y. T. [names deleted]

Alleged victims: The authors

State party: Canada

Date of communication: 14 October 1993

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 8 April 1994,

Adopts the following:

Decision on admissibility

1. The authors of the communication are M. A. B., W. A. T. and J.-A. Y. T., three Canadian citizens and members of an organization named "Assembly of the Church of the Universe", based in Hamilton, Ontario, Canada. They claim to be victims of violations by Canada of articles 9, 14, 15 and 17 of the International Covenant on Civil and Political Rights.

The facts as presented by the authors

2.1 The authors are leading members and "plenipotentiaries" of the "Assembly of the Church of the Universe", whose beliefs and practices, according to the authors, necessarily involve the care, cultivation, possession, distribution, maintenance, integrity and worship of the "Sacrament" of the Church. Whereas the authors also refer to this "Sacrament" as "God's tree of life", it is generally known under the designation *cannabis sativa* or marijuana.

2.2 Since the foundation of the Church, several of its members have come into conflict with the law, as their relationship with and worship of marijuana falls within the scope of application of the provisions of the Canadian Narcotic Control Act.

2.3 On 17 October 1990, a constable of the Royal Canadian Mounted Police (RCMP) entered the Church's premises in Hamilton, Ontario, under the pretext of wishing to join the Church and to purchase the "Church Sacrament". She was offered a few grams of marijuana, which led to the arrest of W. A. T. and J.-A. Y. T. All of the marijuana and money found in their possession were confiscated and they were ordered to stand trial before a jury, under the terms of section 4 of the Narcotic Control Act. Further investigations into the activities and properties of the Church also led to the arrest and detention of M. A. B.

2.4 The trial of W. A. T. and J.-A. Y. T. was scheduled to commence before a court in Hamilton on 1 November 1993, and the trial of M. A. B. was scheduled to begin on 14 November 1993. Another action based on unspecified charges against M. A. B. filed in the course of 1987, was scheduled to be heard during the week beginning 13 December 1993. [a] It is thus obvious that the authors have not yet exhausted available domestic remedies in Canada.

2.5 It should be noted that the judicial authorities, before deciding to hear the authors' cases, sought to dismiss their arguments on the basis of frivolousness. From the authors' submission, it appears that all of the authors' claims based upon alleged violations of their freedom of religion and conscience were indeed dismissed by the Canadian courts. Thus, "many notices of application for leave to appeal to the Supreme Court of Canada" have been dismissed, and an application for leave to appeal to the Judicial Committee of the Privy Council [sic] has been "illegally ignored".

The complaint

3.1 The authors contend that they are denied a fair and public hearing before an impartial and independent tribunal. They contend that their previous court actions and constitutional challenges in the Federal Court of Canada, directed against the action or inaction of the Ontario courts and the Attorney-General, both at the provincial and federal levels, have not been heard. It is apparent from the authors' submission that they contend that there is no independent or impartial forum in Canada to hear their complaint. Thus, their complaint is directed against the Parliament of Canada, the Federal Court of Canada, the Supreme Court of Canada, RCMP, Her Majesty the Queen in Right of Canada, the Parliament of Ontario and the courts of Ontario.

3.2 The authors further contend that the following rights have been violated:

(a) Their right to liberty and security of person;

(b) Their right not to be subjected to arbitrary arrest and detention;

(c) Their right to freedom from interference with their privacy;

(d) Their right to be free from unlawful attack on their honour and reputation;

(e) Their right to protection of the law against such interference;

(f) Their right to freedom of thought, conscience and religion and to manifest these beliefs in worship, practice and religion;

(g) Their right to be free from any coercion which would impair their freedom to have or to adopt a religion or belief of their choice.

3.3 The authors request the Committee to intercede to stop the proceedings instituted against them. They request attendance at the Committee's "hearing" of their case, the right to videotape the proceedings, as well as a writ of prohibition preventing the Canadian Government and its agencies from "persecuting and prosecuting the applicants [as] regards the manifestation of their religious beliefs in worship, observance, practice and teaching pertaining to the cultivation, distribution and use of the Church Sacrament ...".

Issues and proceedings before the Committee

4.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

4.2 Taking into account the requirements laid down in articles 2 and 3 of the Optional Protocol, the Committee has examined whether the facts as submitted would raise _prima facie_ issues under any provision of the Covenant. It concludes that they do not. In particular, a belief consisting primarily or exclusively in the worship and distribution of a narcotic drug cannot conceivably be brought within the scope of article 18 of the Covenant (freedom of religion and conscience), nor can arrest for possession and distribution of a narcotic drug conceivably come within the scope of article 9, paragraph 1, of the Covenant (freedom from arbitrary arrest and detention).

4.3 The Committee further observes that the conditions for declaring a communication admissible include, _inter alia_, that the claims submitted be sufficiently substantiated and that they do not constitute an abuse of the right of submission. The authors' communication reveals that these conditions have not been met. In particular, the allegations against the judicial authorities of Canada are of a sweeping nature and have not been substantiated in such a way as to show how the authors would qualify as victims within the meaning of article 1 of the Optional Protocol. This situation justifies doubts about the seriousness of the authors' claims under article 14 and leads the Committee to conclude that they constitute an abuse of the right of submission under article 3 of the Optional Protocol.

5. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under articles 2 and 3 of the Optional Protocol;

(b) That this decision shall be communicated to the authors and, for information, to the State party.

[Adopted in English, French and Spanish, the French text being the original version.]

Notes

_a_/ The communication is dated 14 October 1993. As of 20 January 1994, the authors had failed to provide information about the result of their trials.